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OF THE
ROYAL ASIATIC SOCIETY.
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Hiſtoria Placitorum Coronæ.

THE

HISTORY

OF THE

Pleas of the Crown.

By SIR MATTHEW HALE,

LORD CHIEF JUSTICE OF THE COURT OF KING's BENCH.

PUBLISHED FROM THE ORIGINAL MANUSCRIPTS

By SOLLOM EMLYN, of Lincoln's-Inn, Eſq.

WITH

ADDITIONAL NOTES AND REFERENCES TO MODERN CASES CONCERNING THE PLEAS OF THE CROWN.

By GEORGE WILSON, SERJEANT AT LAW.

A NEW EDITION.

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AND

AN ABRIDGMENT OF THE STATUTES RELATING TO FELONIES CONTINUED TO THE PRESENT TIME, WITH NOTES AND REFERENCES,

By THOMAS DOGHERTY, *Eſq.*

OF CLIFFORD'S-INN.

LIBRARY OF THE BOMBAY BRANCH OF THE ROYAL ASIATIC SOCIETY

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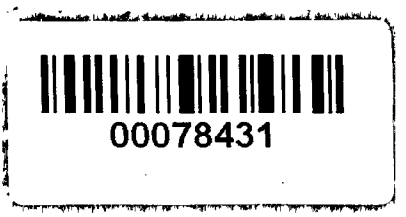
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ROYAL ASIATIC SOCIETY OF THE BOMBAY BRANCH OF THE LIBRARY

A

TABLE

OF

THE SEVERAL CHAPTERS

CONTAINED IN THE

SECOND PART.

Chap. I. *TOUCHING the* King's bench. Page 1

Chap. II. *Concerning the courts before the* lord High-ſteward, *and the* Steward of his majeſty's houſhold. 7

Chap. III. *Touching* ſpecial commiſſions *of* oyer *and* terminer, *and their kinds and power.* 10

Chap. IV. *Concerning* general commiſſions *of* oyer *and* terminer. 22

Chap. V. *Touching* Juſtices *of* gaol-delivery. 32

Chap. VI. *Touching the power of* Juſtices of aſſiſe *and* niſi prius *with relation to felony.* 39

Chap. VII. *Concerning the* commiſſion of peace, *and the power thereof in relation to felonies.* 42

Chap. VIII. *Concerning the* Coroner and his court, *and his authority in pleas of the crown.* 53

Chap. IX. *Concerning the* Sheriff, *his power in pleas of the crown, as well by commiſſion as in his* Turns. 69

Chap. X. *Concerning the* apprehending *and* arreſting *of felons and traitors by* private perſons, *and* eſcapes. 72

Chap. XI

Chap. XI. *Concerning* arreſts *or* apprehenſion of felons *or perſons* ſuſpected of felony *by an* officer. Page 85
Chap. XII. *Of* arreſts of felons *upon* hue *and* cry *raiſed.* 98
Chap. XIII. *Arreſts of felons* virtute præcepti, *or of* warrants. 105
Chap. XIV. *Concerning the* office of a juſtice, *when a perſon charged or ſuſpected of* felony *is* brought before him. 120
Chap. XV. *Concerning* bail *and* mainpriſe. 124
Chap. XVI. *Concerning the ſtatutes of* 34 E. 3. 1 R. 3. 3 H. 7, 1 & 2 P. & M. 2 & 3 P. & M. *in relation to* bailment of priſoners. 136
Chap. XVII. *Concerning the* fourth general, *namely, the* various manner *of bailing of priſoners.* 140
Chap. XVIII. *Concerning* warrants to ſearch for ſtolen goods, *and* ſeizing *of them.* 149
Chap. XIX. *Concerning* preſentments, inquiſitions, *and* indictments, *and their kinds.* 152
Chap. XX. *Where a man ſhall be* put to anſwer *in* criminal *and* capital offenſes without indictment *at the king's ſuit.* 156
Chap. XXI. *Who may be indictors, and where and how returned.* * 152
Chap. XXII. *Concerning the* demeanor of the grand inqueſt *in relation to their preſentments.* 157
Chap. XXIII. *Concerning the* forms of indictments in caſes capital, *and firſt touching the* form of the caption *returned upon a* certiorari. 165
Chap. XXIV. *Concerning the* body of the indictment *in caſes capital, and the* ſeveral parts *thereof, and the* forms *requiſite therein.* 168
Chap. XXV. *Concerning the* forms of indictments *in particular, and the* ſeveral parts *thereof.* 174
Chap. XXVI. *Concerning* proceſs upon indictments. 194
Chap. XXVII. *Touching* certiorari *out of the King's bench.* 210
Chap. XXVIII. *Touching the* arraignment of offenders *in capital offenſes.* 216
Chap. XXIX. *Concerning the* plea of the priſoner *upon his arraignment, and firſt* of his confeſſion *of the fact charged,* and approving *others.* 225
Chap. XXX. *Concerning the* pleas of the priſoner *upon his arraignment, and firſt, concerning* pleas in abatement of the indictment. 236

Chap. XXXI.

Chap. XXXI. *Concerning* pleas in bar *of an indictment of felony or treaſon, and firſt of* auterfoits acquit. Page 240
Chap. XXXII. *Concerning the plea of* auterfoits attaint *or* convict *of the ſame felony, or any other offenſe.* 251
Chap. XXXIII. *Concerning pleas to the felony,* viz. Not guilty. 255
Chap. XXXIV. *Touching the* trial *of offenders* by jury, *and firſt* the proceſs. 259
Chap. XXXV. *Concerning* challenges, *and firſt of* peremptory challenges. 267
Chap. XXXVI. *Concerning* challenges for cauſe *in caſe of indictments for treaſon or felony.* 271
Chap. XXXVII. *Concerning* evidence *and* witneſſes. 276
Chap. XXXVIII. *Concerning* evidence in writing. 284
Chap. XXXIX. *Concerning* evidences *requiſite or allowed* by acts of parliament, *and* preſumptive evidence. 286
Chap. XL. *Concerning* variance *between the* indictment *and* evidence, *and where the* evidence proves the indictment, *and where not.* 291
Chap. XLI. *Concerning the* demeanor of the jury, *and* how their verdict *is to be given.* 293
Chap. XLII. *Concerning the* miſdemeanors of jurors, *and* their puniſhment. 306
Chap. XLIII. *Concerning* ſtanding mute, *and the puniſhment of* penance, *or* peine fort & dure. 314
Chap. XLIV. *Concerning* clergy, *how it ſtood* at common law, *and how generally* at this day. 323
Chap. XLV. *In* what offenſes *clergy is allowable or not.* 330
Chap. XLVI. Where and in what offenſes, *that were capital at common law,* clergy is taken away *in part or in whole, by acts of parliament ſubſequent to* 25 E. 3. *and firſt of* petit treaſon. 334
Chap. XLVII. *Concerning the alteration made by ſeveral* ſtatutes *in* caſes *of* murder, manſlaughter, rape, *and* wilful burning *of houſes or barns with corn.* 343
Chap. XLVIII. *Concerning* clergy in robbery from the houſe, *or* robbery from the perſon. 348
Chap. XLIX. *Concerning* clergy *in* burglary. 360
Chap. L. *Concerning* clergy *in* ſimple larciny *and other felonies.* 364
Chap. LI. *What* perſons *are or are not* capable of clergy. 371
Chap. LII. *At* what time *clergy is to be allowed.* 377

Chap. LIII. *Concerning* the manner how, *and* the Judge by and before whom *clergy is to be prayed or allowed.* Page 380
Chap. LIV. *Concerning the* conſequences *of* clergy *granted or prayed.* 382
Chap. LV. *Concerning* judgments *in the ſeveral kinds of* capital offenſes. 391
Chap. LVI. *Concerning giving of* judgment, by whom, and when. 401
Chap. LVII. *Concerning* executions. 406
Chap. LVIII. *Concerning* reprieves *before or after judgment.* 412

HISTORIA

PLACITORUM CORONÆ.

PART II.

LIBRARY OF THE BOMBAY BRANCH OF THE ROYAL ASIATIC SOCIETY

CHAP. I.

Touching the King's bench.

HAVING gone through the ſeveral kinds of capital offenſes, I ſhould now, according to my firſt propoſed method, proceed to the enumerating and conſidering of offenſes that are not capital; but I ſhall reſerve that for the third part of this tractate.

1. Becauſe the ſubject thereof is very large, numerous and various, and would exhauſt too much of that time I have or can ſpend from other employments.

2. Becauſe the method, order and rules of proceeding in captital cauſes, is different from any other courſe of proceeding in other criminal cauſes, and hath an appropriate method of proceeding by law conſigned to it, and therefore they are fitteſt to be handled together.

And in this buſineſs I ſhall proceed in things as they ariſe in the order of proceeding in capital cauſes: *Firſt*, I ſhall take a very brief account of the courts and juriſdictions wherein [2] they are to be decided; and this I ſhall not do at large, but ſo far forth only as it relates to proceedings in capital cauſes: and when I have briefly paſſed over that, then, *ſecondly*, I ſhall proceed with the whole tract of proceeding in criminal cauſes, from the firſt purſuit of the offender to his execution; as, namely, arreſt, proceſs, out-

lawry, arraignment, pleading, challenge, trial, clergy, ſanctuary, judgment, reprieve, execution, *&c.* in the very ſame order as a courſe of proceeding in capital cauſes lies.

I. I begin with the juriſdictions, wherein cauſes of this nature are handled.

And altho the court of parliament is the higheſt court in this kingdom, and a court wherein proceedings capital have been often heard and determined, yet I ſhall decline that buſineſs, 1. Becauſe the courſe of proceeding in parliament is in a different method and order, than what is uſed in other ordinary courts. 2. Becauſe the inſtances are many and various, and will take up a volume to give an account of them. 3. Becauſe I have elſewhere gathered up ſome obſervations of that kind already.

The higheſt ordinary court of juſtice next to the court of parliament. is the court of king's bench; I ſhall not at large purſue the juriſdiction of this court, for it hath been done to my hands amply already *(a)*.

But I ſhall only conſider it with relation to capital proceedings, namely, treaſons and felonies, and that very briefly; and therein, 1. Concerning the juriſdiction of the court in this particular. 2 Concerning the power of the judges of this court out of court, in relation to matters of crime or miſdemeanor.

The court of king's bench conſiſts of two kinds of juriſdictions, *viz.* the civil juriſdiction or the plea-ſide, and the criminal juriſdiction or the crown-ſide.

Till the time of Edward II. the matters of both kinds were entered promiſcuouſly in the rolls; but then the rolls were diſcriminated, and thoſe of the crown-ſide, entitled *Rex*, tho both were filed up together in the ſame bundles.

[3]

And thus it continued very long, but of later times the records of the pleas are bound up by themſelves, and the records of the pleas of the crown bound up by themſelves, and kept in the crown-office, under the immediate cuſtody of the coroner of the king's bench, who is alſo the king's attorney in that court, and clerk of the crown.

In caſes criminal, the court of king's bench have a different kind of proceeding touching offenſes ariſing in the ſame county where they ſit, and offenſes in other counties, and removed before them by *Certiorari*.

(a) By lord *Coke*, 4 *Inſtit. cap.* 7.

In

In the county where the court ſits, there is every term a grand inqueſt, who are to preſent all matters criminal ariſing within that county, and then the ſame court proceeds upon indictment ſo taken; or if in the vacation-time there be any indictment of felony before the juſtices of the peace, *oyer* and *terminer*, or gaol-delivery there ſitting, it may be removed by *Certiorari* into the king's bench, and they may proceed *de die in diem*, and there need not be fifteen days between the *Teſte* and return of the *Venire facias*, becauſe the offenſe ariſeth in the ſame county.

But if an indictment of felony be removed out of another county than where the king's bench ſits, and the priſoner comes in either *gratis*, or by *Habeas Corpus*, or proceſs, there muſt be fifteen days between the *Teſte* and the return of the *Venire facias*. 9 *Co. Rep.* 118. *b.* lord *Sanchar's* caſe.

At common law, if a record of an indictment, or other thing come into the court before the filing thereof, the court may remand it; for 'till it be filed it is no record of the court; but if it be once filed, it is not to be remanded.

But if the iſſue be joined, the tranſcript may be ſent down to be tried by *Niſi prius*; but the original record remains in the king's bench. 5 *Martiæ*, *B. Coron.* 231.

But by the ſtatute of 6 *H.* 8. *cap.* 6. in caſes of indictments of murder, or other felony removed into that court, the court may remand the indictments, and the bodies of the priſoners to the juſtices of the peace, gaol-delivery, and other juſtices, where the felony was committed, commanding them to proceed thereupon, as if the priſoner or indictment had never been removed. [4]

The court of king's bench is in the county where it ſits, a court in *eyre* and more, 27 *Aſſiz.* 1. and alſo the ſovereign court of gaol-delivery and *oyer* and *terminer*. 9 *Co. Rep.* 118. *a.* lord *Sanchar's* caſe.

And therefore when the court of king's bench comes into any county, there can be no ſeſſion of the commiſſion of gaol-delivery, or *oyer* and *terminer*, or peace during the term-time, while the court ſits; it doth not determine the commiſſion, but ſuſpends their ſeſſion during the term; for in the vacation-time, they may proceed again upon their former commiſſion, and ſo it is not like a new commiſſion, which after publication ſuperſedes the former, *de quo infra*, lord *Sanchar's* caſe, *ubi ſupra*.

But if an indictment be found before commiſſioners of *oyer* and *terminer* in the vacation-time in the county where the king's bench ſits, or in any other county in term or vacation, there may iſſue a ſpecial commiſſion to determine that indictment, with a writ to the former commiſſioners to deliver it to the new commiſſioners; and theſe ſpecial commiſſioners may ſit in the term-time in the county where the king's bench ſits; but then the king's bench muſt adjourn during that ſeſſion of this ſpecial commiſſion: ruled in Sir *Walter Rawleigh*'s caſe, *M.* 1 *Jac. Co. P. C. cap.* 2. *p.* 27. *Dyer* 286. *b. Plowd. Com.* 390. earl of *Leiceſter*'s caſe, wherein is the whole order of ſuch commiſſion. 4 *Co. Inſtit. p.* 73.

The court of king's bench is the ſovereign court of *oyer* and *terminer*, therefore tho ſome acts limit proceedings in ſome criminal cauſes to the juſtices of *oyer* and *terminer*, yet the king's bench may proceed upon them; but juſtices of peace cannot, as upon 5 *Eliz. cap.* 14. for forgery, 8 *H.* 6. *cap.* 12. ſtealing records, *&c.*

If a perſon attainted in the country be removed by *Habeas Corpus*, and the record removed alſo by *Certiorari*, this court may award execution. *M.* 5 *Car.* 1. *B. R. Coxe*'s caſe *(b)*.

[5] This court is alſo the ſovereign coroner of *England*, and therefore may take appeals of death, *&c.* by bill. 4 *Co. Inſt. p.* 73.

Where judgment of death is given in the king's bench, the execution is to be made by the marſhal of the court; for the priſoner ſuppoſed to be *in cuſtodiâ mareſcalli*; and the entry is always, *Et præceptum eſt mareſcallo, &c. quòd faciat executionem periculo incumbente*; *quod vide Co. Entries in* title *Indictment, per totum*; but there may be a mandate to the ſheriff of the county wherein execution is to be made, to be aſſiſting; and thus it was done in *H.* 24 *Car.* 2. in the caſe of *Brown*, who had judgment of death in the king's bench for a felony committed in *Middleſex*, and executed by the marſhal in *Surrey*, becauſe the priſon was there; but he might have done it in *Middleſex*, for he is a miniſter of the king's bench in each county; and ſo it might be, tho the felony had been done in any foreign county removed by *Certiorari (c)*.

By the ſtatute of 33 *H.* 8. *cap.* 12. felonies, *&c.* within the king's palace are made triable before the lord ſteward, and a ſpecial order

(b) *Cro. Car.* 176. before mentiond, *Part* I. *p.* 464.
(c) Thus it was done in *Althoe*'s caſe

of

of trial directed by that ſtatute, namely, by the king's ſervants in his chequer-roll; yet for a felony within the king's palace, if the king's bench be ſitting in the ſame county, the proceeding may be in the king's bench; for the ſtatute of 33 *H.* 8. being in the affirmative is not excluſive of the king's bench for felonies that were before that, 10 *Co. Rep.* 73. *b.* But indeed where a felony is *de novo* created, and with it a new ſpecial form of proceeding, as by the ſtatute of 3 *H.* 7. *cap.* 14. for conſpiring the death of the king, *&c.* it is not triable in the king's bench, nor in any other form than is limited by that act. *M.* 20 *Jac. B. R. Caſtle*'s caſe *(d)*.

Now concerning the juſtices of the king's bench.

They are in their perſons conſervators of the peace throughout *England* without any other commiſſion; and any of them may iſſue out their warrants for apprehending of a malefactor, or for ſurety of the peace in any county of *England*, namely, to [6] apprehend and bring him before a juſtice of peace in the county where he is apprehended; and this warrant is directed under their hand and ſeal to ſheriffs, conſtables, and other officers. Each judge of that court hath a tipſtaff attending him, being a deputy to the marſhal for the execution of his office in that ſpecial ſervice; and the chief juſtice, or any one of the other judges of that court, may by the cuſtom of that court, *ore tenus*, command the tipſtaff to apprehend any perſon for matters of miſdemeanors relating to the court, or other miſdemeanors, and bring him before him, and ſuch arreſt is juſtifiable without any other warrant, and without ſhewing the cauſe. *T.* 11 *Car. B. R.* 2 *Rol. Abr. p.* 558. *Throgmorton* and *Allen.*

The chief juſtice of the king's bench is not *that Juſticiarius Angliæ* which was antiently in uſe; for *that Juſticiarius Angliæ* had, in effect, all the juriſdiction both civil and criminal, that is in the king's bench, chancery, common pleas, and exchequer, and might and did ſit in any of thoſe courts as the chief judge of them, as appears by many evident inſtances.

But the chief juſtice of the king's bench hath in the court of king's bench, as one of the judges thereof, that part of the juriſdiction of the *Juſticiarius Angliæ*, which concerns criminal cauſes, and the inſpection and reformation of the judgments of other courts.

It is true he is frequently called chief juſtice of *England*, becauſe he preſides in that court where the *Juſticiarius Angliæ* did moſt fre-

(d) Cro. Jac. 463.

quently and naturally ſit as the king's deputy in adminiſtration of juſtice; but it is a miſconcluſion that therefore he is *that Magnus Juſticiarius Angliæ*, which was in uſe before the time of *Henry* III.

He is created by writ, and always was; but the *Juſticiarius Angliæ* by patent.

3 Blackſ. Com. ch. 4. p. 41. 4 Blackſ. Com. ch. 19. p. 265. 2 Hawk. P. C. ch. 3.

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[7] CHAP. II.

Concerning the courts before the lord high ſteward, *and the* ſteward of his majeſty's houſhold.

TOUCHING the *former* of theſe, it is inſtituted for the trial of peers of the realm: more cannot be ſaid touching it, than is already ſaid by my lord *Coke*, 4 *Inſt. cap.* 4. *Co. P. C. cap.* 2. *p.* 28. *& ſequentibus*, and becauſe it doth not concern the uſual and common proceedings againſt common perſons, I ſhall diſmiſs it.

Touching the *ſecond*, namely, the proceeding before the lord ſteward of the houſhold, *&c.* for treaſons, and murder, and manſlaughter, and larciny done within the king's palace.

This court is eſtabliſhed, and the method of proceeding therein punctually delivered by the ſtatute of 33 *H.* 8. *cap.* 12. which will not need much explanation, only theſe things are conſiderable therein.

1. As to their power of hearing and determining treaſons in that court, it ſeems to be wholly abrogated and repealed by the ſtatute of 1 *& 2 P. & M. cap.* 10.

2. Whereas by that act, clergy is taken away in caſes of manſlaughter, felonious ſtealing of goods in the king's houſe of the value of twelve-pence; it ſeems to me clergy is reſtored in theſe caſes by the act of 1 *E.* 6. *cap.* 12. tho the party be convict according to the ſtatute of 33 *H.* 8.

3. Whereas breaking of the king's houſe with intent to ſteal, is made felony by that ſtatute without benefit of clergy, *that* breaking of the king's houſe is become no felony by the ſtatute of 1 *E.* 6. *cap.* 12. and 1 *Mar. cap.* 1. tho he be arraigned before the ſteward of the *Marſhalſea* according to that act.

4. The

4. The offenſe of felonious ſtealing of the king's goods of the value of twelve-pence, or breaking the king's houſe to ſteal the goods, is limited by that act to be tried before the ſteward of the *Marſhalſea*, and others aſſociated to him by the ſtatute, but not before the lord ſteward, or treaſurer, or comptroller of the houſhold, as manſlaughter or murder is directed to be tried or determined by that ſtatute, nor by the king's ſervants.

5. It ſeems to me, that by the direction of that act the proceeding of the lord ſteward, or ſteward of the *Marſhalſea*, is to be by a ſeſſion within the king's houſe or palace where the felony is committed; and that ſtatute limits the precinct of the king's palace for that purpoſe, *viz. within any edifices, places, courts, gardens, orchards, privy-walks, tilt-yards, wood yards, tennis-plays, cock-fights, bowling alleys, near adjoining to any of the houſes aforeſaid, and being part of the ſame, or within 200 foot of the ſtandard of any outward gate, or gates of any of the houſes above rehearſed, commonly uſed for any paſſage out of, or from any of the houſes above rehearſed.*

And therefore if it is conſiderable, whether as to this purpoſe, *viz.* for trial of felonies within the king's palace, the extent of the king's palace of *Whitehall* limited, or rather extended by the act of 28 *H.* 8. *cap.* 12. be not reſtrained; for by that ſtatute that new palace of *Whitehall*, the old palace of *Weſtminſter*, *St. James*'s park, and the ſtreet leading from *Charing-Croſs* to the ſanctuary-gate of *Weſtminſter*, and all the houſes and buildings on both ſides of the ſtreet from the *Croſs* to *Weſtminſter-hall*, and between the water of *Thames* on the eaſt and the park-wall on the weſt, and all the ſoil of the old palace are made parcel of the new palace.

Upon this doubt I did adviſe, that the lord ſteward upon a late occaſion upon this act ſhould not ſit in *Weſtminſter-hall*, but in *White-hall*, according to the reſtriction of the ſtatute of 33 *H.* 8. which was after the ſtatute of 28 *H.* 8. and ſeems as to this purpoſe to reſtrain it; but this advice was not followed, for he ſat in *Weſtminſter-hall.*

Atho this act erects a new kind of juriſdiction, and that without any commiſſion, yet it being an act act in the affirmative, it doth not exclude the juriſdiction of the king's bench, nor of commiſſioners of *oyer* and *terminer* to hear and determine theſe offenſes, tho committed in the king's palace, eſpecially *that* commiſſion [9]

of *oyer* and *terminer*, which hath been uſually granted to determine felonies and treaſons within the verge, and particularly within the king's palaces; and therefore, tho this act of 33 *H.* 8. *cap.* 12. hath been long ſince made, and is a commiſſion of itſelf to the lord ſteward, and in his abſence to the treaſurer and comptroller of the houſhold, yet till this year I never knew nor heard of any ſeſſion upon this ſtatute: but the whole buſineſs of this nature was tranſacted in the king's bench, or by *that* antient and ſpecial commiſſion of *oyer* and *terminer* for offenſes within the verge, which commonly alſo had in it a commiſſion of gaol-delivery, and was uſually directed to the lord ſteward, lord chancellor, treaſurer, juſtices, *&c.* whereof we may ſee the precedent, 4 *Co. Rep. Holcroft*'s caſe *(a)*, the record whereof is at large, *New Entries, fol.* 54. *(b)* in an appeal, where it appears by the indictment, that the manſlaughter was committed *infra hoſpitium domini regis de Hampton-Court*, yet the inquiſition was found by the coroner, and the party tried before the commiſſioners of *oyer* and *terminer* and gaol-delivery for the verge, and not before the lord ſteward, by force of the act of 33 *H.* 8. and adjudged good.

And there it is alſo reſolved 4 *Co. Rep. Wrot*'s caſe *(c)* and *Swift*'s caſe *(d)*, that as the commiſſioners of gaol-delivery and *oyer* and *terminer* for the verge, have power to hear and determine felonies done in the king's palace, ſo the king's bench or general commiſſioners of *oyer* and *terminer* or gaol-delivery, and juſtices of peace for the county, have power to hear and determine any felony committed within the verge, ſo that they have all a concurrent juriſdiction, namely, the [10] lord ſteward, commiſſioners of *oyer* and *terminer* and gaol-delivery for the verge, commiſſioners of *oyer* and *terminer*, gaol-delivery and peace for the county at large, tho the offenſe were committed in the king's palace.

(a) 4 *Co.* 45. *b.* *(b)* This is *Co. Entries.* 53. *b.* *(c)* 4 *Co.* 46. *b.* *(d) Ibid.*

4 Blackſ. Com. ch. 19. p. 261. 276. 2 Hawk. P. C. 5. 7.

CHAP.

CHAP. III.

Touching ſpecial commiſſions *of* oyer *and* terminer, *and their kinds and power.*

COMMISSIONS of *oyer* and *terminer* are of two kinds, ſpecial, or general for a whole county.

Special commiſſions are of ſeveral kinds. 1. Commiſſions of *oyer* and *terminer* for the verge. 2. For crimes done upon the ſea by the ſtatute of 28 *H.* 8. *cap.* 15. 3. Commiſſions for particular places, that are not counties. 4. Commiſſions to hear and determine particular facts. 5. Commiſſions to hear or enquire, and not determine. 6. Commiſſions to determine, and not enquire.

I. Touching commiſſions of *oyer* and *terminer* for the verge, *viz.* within twelve miles of the king's court ſomewhat hath been before ſaid; I ſhall add farther,

1. That by virtue of that commiſſion they have power to inquire and determine felonies and murders done within the king's houſe. 2. And theſe they are to proceed upon, not according to the direction given to the lord ſteward, *viz.* by the king's yeomen officers, tho there is a grand inqueſt of them alſo; but by the good men of the county, wherein the offenſe was committed, whether it be committed in the palace, or elſewhere within the verge. 3. Tho the commiſſion extend into ſeveral counties; namely, any that are within twelve miles of the tenet of the king's hall, yet they are to hold their ſeſſions in any county within the verge, and a precept iſſues to the knight marſhal to impanel a grand inqueſt out of every [11] county within the verge, of the men of thoſe counties to appear where they ſit, and there to inquire and try the offenſes committed in that county. 4. That they can only proceed upon indictments taken before themſelves, and therefore cannot proceed upon a coroner's inqueſt; and to remedy that inconvenience, they have always, or at leaſt ſhould have in the ſame commiſſion, a commiſſion of gaol-delivery; and by virtue of that part of their commiſſion they may proceed upon the coroner's inqueſt; *vide Co. Entries* 34. in *Holcroft*'s caſe. 5. It ſeems to me, that if a ſpecial commiſſion for the verge iſſue, which poſſibly may extend to *Middleſex*, *Surry*, and *Hertford*, if a general commiſſion of *oyer* and *terminer* in the county of *Middleſex* iſſue after

after *that*, with notice to the commiſſioners for the verge, it determines their commiſſion of *oyer* and *terminer* as to *Middleſex*, but not as to the other counties; and ſo for a general commiſſion of gaol-delivery; for this is not aided by the ſtatute of 2 & 3 *P. & M. cap.* 18. for that preſerves only the commiſſions granted to cities and boroughs. 6. And *è converſo*, if a general commiſſion of *oyer* and *terminer*, or gaol delivery for the county iſſue, and then afterwards a like commiſſion iſſue for the verge, notice thereof, or ſeſſion by the commiſſion for the verge determines the general commiſſion as to ſo much of the county, as is within the precinct of the verge; ſee the whole procedure, *Coke's Entries p.* 54, 55.

Tho commiſſions for the verge have often iſſued, I do not remember any ſeſſion ſince about 8 *Car.* 1. for the buſineſſes that fall within their cognizance, are as well and effectually diſpatched in the king's bench, or by general commiſſion of gaol-delivery, and *oyer* and *terminer* in the ſeveral counties at large; *quod vide* 10 *Co. Rep.* 73. *b.* the caſe of the *Marſhalſea*, 4 *Co. Rep. Wrott* and *Wigg*'s caſe, and *Holcroft*'s caſe there cited; only indeed the coroner of the verge is a neceſſary officer; *de quo poſtea.*

But the original power of the ſteward and marſhal touching felonies
[12] within the verge, tho I know nothing that hath expreſly taken it away, yet by *diſuſer* is in effect vaniſhed, and that juriſdiction is wholy exerciſed by this ſpecial commiſſion of *oyer* and *terminer*, or in the king's bench, or general juſtices of *oyer* and *terminer* or gaol-delivery at large, who have juriſdiction of ſuch felonies, tho committed within the verge; *vide Coke ſuper ſtatut. Articuli ſuper Cartas, cap.* 3 & 10 *Co. Rep. le caſe de Marſhalſea.*

II. The ſecond kind of ſpecial commiſſion of *oyer* and *terminer*, is, that which is founded upon the ſtatute of 28 *H.* 8. *cap.* 15. for offenſes upon the ſea, or in great rivers below the bridges.

I ſhall not enter into a large deſcription of the admiral's juriſdiction, but only ſet down briefly ſome obſervations in relation to capital offenſes, becauſe I have elſewhere more at large examined it.

As to criminal cauſes, that are capital, as treaſons, felonies, &c. there is a threefold juriſdiction relative to the admiral and court of admiralty.

1. Its primitive and original juriſdiction, and this was of treaſons, felonies, or piracies done upon the high ſea, which was ſometimes held before the admiral, or his lieutenant as ſuch without relation to

any

any other commiſſion; and ſometimes by ſpecial commiſſion under the great ſeal, even whether there was an admiral in being or not.

The rule of their proceeding was *ſecundum legem maritimam*, their trial by proofs; and therefore, though they did proceed oftentimes to ſentence of death, and executed it, yet in as much as the proceeding was according to the courſe of the civil and marine laws, and not according to the common law, it worked no corruption of blood.

Tho their juriſdiction was of things done upon the high ſea, yet they might hold their ſeſſion in any place upon land.

And altho at this day it is commonly received, that the courts of the common law have no juriſdiction of felonies committed upon the high ſea, yet moſt certainly the king's bench had uſually cognizance of felonies and treaſons done upon the narrow ſeas, tho out of the bodies of counties, and it was preſented and tried by men of the adjacent counties. *T.* 18 *E.* 2. *Rot.* 18. *Rex. Glouc.* [13] *& Somers'. M.* 26 *E.* 3. *Rot.* 51. *Norfolk. T.* 34 *E.* 1. *coram Rege. Rot.* 34. *Norfolk. T.* 8 *E.* 2. *ibidem Rot.* 111. *M.* 18 *E.* 2. *Rot.* 15. *M.* 19 *E.* 2. *Rot.* 17. *Rex. T.* 25 *E.* 3. *Rot.* 22. *Linc. M.* 27 *E.* 3. *Rot.* 29. *Rex. (a).* 8 *E.* 2. *Coron.* 399. 40 *Aſſiz.* 25. So that the court

(a) The caſes refered to here by lord *Hale*, as proofs of the antient juriſdiction of the king's bench in offenſes done upon the ſeas, were as follow:

Trin. 18 *E.* 2. *Rot.* 18 *Rex.* Several perſons of *Briſtol* had been indicted before the admiral of the king's flota, "per inquiſitionem de mandato regis inde factam, per "ſacramentum marinariorum, quòd vi & "armis, & felonicè deprædati fuerunt navem de *Placentiâ* in alto mari, inter *Le* "*Ras* ſancti *Martini*, & *Odyern*', de bonis "& mercimoniis, &c." The indictment was returned into chancery, and a writ iſſued to the ſheriff of *Glouceſterſhire* to attach the ſaid perſons, and bring them *coram ſeipſo* and the mayor of *Briſtol & auditâ querelâ*, to do juſtice to the merchants, "ſuper recuperatione bonorum ſecundum "legem mercatoriam, & nihilominus malefactores, prædictos in priſonâ ſalvo cuſtodiri facere," till they ſhould be delivered by courſe of law. The ſheriff neglecting to execute effectually what was injoined him by the ſaid writ, a ſecond writ was directed to the mayor of *Briſtol*, "Quòd "præmiſſa omnia & ſingula diligenter & "efficaciter faceret, &c." Afterwards *proceſſus totius negotii prædicti* was brought *coram rege*, by which it appears, that one *Clement Turtle* had been impleaded before the ſaid mayor, by the maſter of the ſhip, *&c.* "Quòd habuit ad partem ſuam de "bonis deprædatis ad valentiam 25. in"juſtè, &c. Et hoc parati ſunt verificare "per mercatores & marinarios villæ præ"dictæ." *Turtle* pleaded not guilty, and was acquitted by a jury of merchants and mariners; the which jury *ex officio* again indicted the ſame perſons, who had before been indicted "coram admirallo flotæ, "quòd navem prædictam de bonis, &c. "felonicè deprædarunt," and thereupon a *capias* iſſued to the ſheriff to bring them *coram Rege ubicunque, &c.* to anſwer for the ſaid crime, *&c.*

Mitch. 26 *E.* 3. *Rot.* 51. *in dorſo coram Rege. Norfolk. John Selondere* impleaded ſeveral perſons, *de placito tranſgreſſionis per billam*, for entering his ſhip *ſuper coſterum maris de* North'lenn', beating and wounding him, and plundering the ſhip, *quam in mari prædicta reliquerunt in deſperatam, per quod navis prædicta periit omnino*; and recover'd 360 marks againſt them, for the damages ſuſtained thereby.

Trin. 34 *E.* 1. *Rot.* 34. *coram Rege. Norfolk.* Several merchants of *Lincoln* put on board a ſhip wool and other commodities for *Brabant*, to the value of 896*l.* 10*s.* The ſhip in its paſſage was entered in a hoſtile manner in the port of *Gerſlet* in *Zealand*,

and

court of king's bench had certainly a concurrent juriſdiction with the admiralty, in caſes of felonies done upon the narrow

and plundered by the ſubjects of the earl of *Hainault*; ſatisfaction had been demanded of the earl for this depredation in vain; and thereupon, at the ſuit of the ſaid merchants of *Lincoln*, a writ was directed to the bailiffs of *Lynn* to ſeize *omnia bona*, &c. of the merchants of *Hainault*, and keep them till the *Lincoln* merchants had received ſatisfaction, or till farther order ſhould be taken therein. To this writ the bailiffs returned, that the *Hainault* merchants had *nulla bona infra ballivam ſuam*: upon this a *Lincoln* merchant came into chancery, and alledged, that ſeizure had been made of goods to the value of 31*l.* 17*s.* by the ſaid bailiffs, which they had redelivered to the *Hainault* merchants without warrant, and thereupon a ſecond writ iſſued to the ſaid bailiffs, ordering them to pay *inailatè* the ſaid 31*l.* 17*s.* to the *Lincoln* merchants in part of their loſs, or elſe to appear *coram Rege in octabis Trin. ubicunque, & interim* to ſeize *omnia bona*, &c. of the *Hainault* merchants, as before. It appears afterwards, *Mich.* 15 *E.* 2. *Rot.* 142. *coram Rege*, that the ſaid earl of *Hainault* in the parliament, *anno* 4 *E.* 2 acknowledged himſelf *per nuncios ſuos*, to be indebted to the *Lincoln* merchants in the ſum of 954*l.* on account of this depredation; 70*l.* of which was allotted to *Walter le Ken* one of them, in ſatisfaction for his loſs; and at his ſuit a writ was directed to the ſheriff, *quod levari faceret* 70 *libras de bonis*, &c. of the *Hainault* merchants, arreſted by conſent of the ſaid earl of *Hainault* at *Yarmouth*, and bring the money into chancery, *ad ſatisfaciendum prædicto Waltero le Ken*: by virtue of which ſeveral ſums of money were paid to him, *in parte debiti prædicti*.

Trin. 8 *E.* 2. 111. *in dorſo. coram Rege. Kanc'.* A mandate iſſues to the conſtable of *Dover*, and warden of the cinque-ports, to take into cuſtody ſeveral perſons, for entering a ſhip from *Flanders vi & armis*, laden with cloth and other goods, belonging to certain merchants of *Ipres*, "quos "pannos abduxerunt, & mercatores liga- "verunt, & impriſonaverunt, &c. ita "quòd habeat eos coram rege ad reſpon- "dendum præfatis mercatoribus ſuper præ- "miſſis, &c."

Mitch. 18 *E.* 2. *Rot.* 25. *in dorſo. coram Rege. Lincoln'.* The mayor and commonalty of *Grymeſby* implead ſeveral perſons "pro "carcandis & diſcarcondis navibus apud "*Villam de Cle*, infra quatuor leucas villæ "*de Grymeſby*," whereby the ſaid corporation was endamaged, and loſt the cuſtom due to them on all goods and merchandiſe, "carcata, ſeu diſcarcata, infra quinque leu- "cas villæ *de Grymeſby*, in auxilium firmæ "ſuæ de rege," and a precept iſſues to the ſheriff to attach, and bring them *coram Rege*, to anſwer for the ſaid offenſes.

Mich. 12 *E.* 2. *Rot.* 17. *Rex.* The king ſignifies by writ to the juſtices of his bench, that precepts had iſſued to ſeveral ſheriffs to attach certain perſons, "quorum nomi- "na ſub pede ſigilli ſui eis miſit, qui du- "rante ſufferentia inter ſubditos regis *An- "gliæ*, & comitis *Flandriæ*, quandam na- "vem de *Flandria* diverſis bonis & mer- "cimoniis, ad valorem 2000 marcarum, "carcatam, infra aquam de *Tyne* prope "*Tynemuth*, vi armatâ ceperunt, & bona "& mercimonia prædicta, &c. inter ſe "partiti fuerunt." In conſequence of which proceſs it appears, *Rot.* 18. *ibidem*, that ſeveral perſons were brought *coram Rege* by the ſheriff of *Northumberland*; where they were impleaded by the king's attorney for having part of the ſaid goods, "Et dicunt quòd nihil ceperunt, &c. Et "de hoc ponunt ſe ſuper patriam." Upon "which the king's attorney joined iſſue with them, and the court bailed them *de die in diem, quouſque*, &c.

Trin. 25 *E.* 3. *Rot.* 22. *Lincoln Rex, William Coupeman* and *Robert Fitz-William* had been indicted, "coram vicecomite & "cuſtodibus pacis in comitatu *Linc'* Quòd "felonice deprædaverunt *Johannem Gryme* "de *Kirkeby*, in mari apud *Fraſton-hord*; "et quòd de *Freſton-hord* porrexerunt ſu- "pra mare verſus partes boreales, & in alto "mari deprædaverunt, & demerſerunt "octo batellas piſcatorum, & ſex homines "in prædictis batellis exiſtentes, felonicè "interfecerunt." The indictments were ſent into the king's bench, and thereupon the ſaid *William* and *Robert* were brought "coram Rege apud *Ayleſbury*, and reſpon- "dendum, &c." But it appearing that both of them had been tried upon the ſaid indictments before the juſtices of gaol-delivery at *Lincoln*, and acquitted; "Con- "ſideratum eſt quòd iidem *Robertus & Wil- "lielmus* eant inde quieti."

Mich. 27 *E.* 3. *Rot.* 29. *Rex. London. Henry Pickard*, coroner of *London*, delivered with his own hand *coram Rege, quoſdam cognitiones coram ipſo factas* in the *Tower* of *London* by ſeveral perſons, who confeſſed that they had felonioufly entered a ſhip near *Feverſham*, thrown the men on board it into the ſea, plundered it, and then ſunk it; that they afterwards went from *Waxeryngg uſque apud foolongg de Tenet*, and felonioufly entered another ſhip there, ſtripped,

row ſeas or coaſt, though it were high ſeas, becauſe within the king's realm of *England*.

And as it was thus in the king's bench, ſo in this caſe ſpecial commiſſions to hear and determine offenſes upon the coaſt, *ſecundum legem & conſuetudinem regni Angliæ*, did often iſſue.

But indeed a general commiſſion of *oyer* and *terminer* of felonies *infra comitatum*, *&c.* did not extend to miſdemeanors upon the ſea-coaſt, unleſs in thoſe creeks and rivers and arms of the ſea, that were within the body of the county.

So that even in theſe caſes of felonies or treaſons committed upon the ſea-coaſt in the narrow ſeas, the king's bench or ſpecial commiſſions of *oyer* and *terminer ſecundum legem & conſuetudinem regni Angliæ*, had a concurrent juriſdiction with the court of admiralty.

But this juriſdiction of the common law courts in caſes of felonies and treaſons, and other crimes committed upon the ſea-coaſt, was interrupted by a ſpecial order of the king and his council, *Clauſ.* 35 *E.* 3. *m.* 28. *dorſo*, and by a *Superſedeas* that iſſued ſhortly after; and ſince 38 *E.* 3. I have not obſerved, that the king's bench, or courts of the common law have proceeded criminally in caſes of crimes of this nature committed upon the high ſea.

But if any felony or treaſon was committed within any creek or arm of the ſea, which was within the body of a county, the courts of the common law only had juriſdiction in ſuch caſes, and the admiral had no juriſdiction at the common law in ſuch caſes.

And thus far touching the juriſdiction of the admiral or maritime court at common law. [16]

2. But by the ſtatute of 15 *R.* 2, *cap.* 3. of the death of a man, or maihem in great ſhips hovering in the main ſtream of great rivers *below the bridges* (for ſo is the record, and not *below the points*) nigh to the ſea, the admiral ſhall have juriſdiction.

ped it of what goods were on board, killed all that were in it except two women, and ſlung them into the ſea; "Et quòd "fornicaverunt cum duabus mulieribus "prædictis, quas quidem poſt tres dies "elapſos felonicè interfecerunt." Upon this four of the ſaid criminals were immediately brought *coram Rege*, and being aſked ſeverally, why judgment ſhould not paſs upon them, "juxta cognitiones ſuas "prædictas, nihil dicunt. Ideò conſider-"atum eſt, quòd trahantur, & ſuſpendan-"tur," As to two others, "quia curia "nondum adviſatur de procedendo ad "judicium ſuper eis," they were committed to the marſhal, and afterwards removed to *Newgate* by the king's writ, being appealed, "coram Vic' & Coron' "Civitatis *London*, by *Allan* de *Crendon*, "de morte *Thomæ* de *Crendon* fratris ſui, "apud le forlonges in mari juxta inſulam "de *Teneto* in com' *Kanc'* felonicè inter-"fecti, ſuper appello prædicto, ſecundum "legem & conſuetudinem regni *Angliæ*, "reſponſuri."

This

This firſt gave the admiral juriſdiction in any river or creek within the body of the county, which only extends to the death of a man and maihem.

But yet obſerve, this is not excluſive of the courts of common law; and therefore the king's bench, or the general commiſſion of *oyer* and *terminer* to hear and determine felonies, *&c.* in the county, have herein a concurrent juriſdiction with the court of admiralty.

And as well the coroner of the county, as of the admiral, may take inquiſitions upon ſuch deaths happening in great rivers, namely, arms of the ſea, that flow and reflow beneath the firſt bridges. 8 *E.* 2. *Coron.* 399.

Only theſe things are obſervable. 1. That it extends only to rivers, that are arms of the ſea, namely, that flow and reflow, and bear great ſhips. 2. It ſeems to extend only to ſuch deaths as happen in thoſe great ſhips, not in ſmall veſſels. 3. That by that ſtatute this juriſdiction is annexed to the court of admiralty, and conſequently they may proceed therein by proofs, according to the courſe of the marine law, and hold their ſeſſion where they pleaſe, tho they did often, even before the ſtatute of 28 *H.* 8. proceed by commiſſion under the great ſeal, and by inquiſition.

3. By the ſtatute of 28 *H.* 8. *cap.* 15. the courſe of proceeding in criminal cauſes is ſettled in a different method, in which theſe things are obſerveable, *viz.* 1. The things to which it extends, *treaſons, felonies, robberies, murders, and confederacies.* 2. Where committed, *viz. in and upon the ſea, or in any other haven, creek, river, or place, where the admiral hath, or pretends to have power, authority, or juriſdiction:* This ſeems to me to extend to great rivers, where the ſea flows and reflows below the firſt bridges, and alſo in creeks of
[17] the ſea at full water, where the ſea flows and reflows, and upon high water upon the ſhore, tho theſe poſſibly be within the body of the county, for there, at leaſt by the ſtatute of 15 *R.* 2. they have a juriſdiction, and thus accordingly it hath been conſtantly uſed in all times, even when judges of the common law have been named and ſat in their commiſſion; but we are not to extend the words *(pretend to have)* to ſuch a pretenſe as is without any right at all, and therefore, altho the admiral pretends to have juriſdiction upon the ſhore, when the water is reflowed, yet he hath no cognizance of a felony committed there; and therefore it was reſolved, 25 *Eliz. Lacie's* caſe, That if a man be ſtricken upon the high ſea, and die

upon

upon the ſhore after the reflux of the water, the admiral by virtue of this commiſſion hath no cognizance of that felony. 2 *Co. Rep. f.* 93. *a. Bingham's* caſe, 5 *Co. Rep. f.* 107. *a. Conſtable's* caſe, *Co. P. C. cap.* 7. *p.* 48. but of this hereafter. 3. The commiſſion muſt be directed to the lord admiral or his lieutenant, and three or four others. 4. The proceeding and trial is to be according to the courſe of the common law, as if the offenſe were committed at land within the realm. 5. Their ſeſſion is to be in ſuch places and counties as ſhall be appointed by the king's commiſſion; no challenge for default of hundreders. 6. The offender excluded from clergy; but *quære*, whether the ſtatute of 1 *E.* 6. *cap.* 12. does not reſtore it even in this caſe, as ſome of the judges in *Alexander Poulter's* caſe *(d)* held? But my lord *Coke*, *P. C. cap.* 49. ſaith piracy is excluded from clergy: It ſeems to me, that as to all offenſes but treaſon, and piracy, and murder, the offender is to have his clergy by the ſtatute of 1 *E.* 6. *cap.* 12. 7. The hearing and determining being directed to be according to the courſe of the common law, if the priſoner ſtands mute, he ſhall have *peine fort & dure. Co. P. C. cap.* 49. *p.* 114. 8. This ſtatute is not repealed by the ſtatute of 35 *H.* 8. *cap.* 2. nor by the ſtatute of 1 & 2 *P. & M. cap.* 10. 9. An acceſſary cannot be puniſhed by this act, but may be puniſhed by the admiral according to the marine or civil law. 10. An attainder upon this act [18] worketh no corruption of blood.

Thus far in general of this commiſſion; only I ſhall add,

1. That touching piracy upon the ſea at this day, it is commonly taken the common law hath no concurent juriſdiction; and therefore if an acceſſary be at land to a piracy at ſea, the commiſſioners upon this ſtatute cannot try it becauſe done at land, and beſides the ſtatute extends only to principals. *Co. P. C. p.* 112. nor can the common law try it, becauſe piracy is not made felony, whereof the common law can take notice; Again, if *A.* commit a robbery at ſea, and brings the goods to land within the body of a county, this is not felony triable by the common law, becauſe the common law takes no notice of the original fact. *Co. P. C. p.* 113. *Butler's* caſe cited 28 *Eliz.*

2. That touching treaſon or felony committed upon the high ſea, as the law now ſtands, it is not determinable by the common law courts, but only upon this ſtatute.

(d) 11 *Co.* 31. *b.*

3. But

3. But if a felony be committed in a navigable arm of the ſea, the common law hath a concurrent juriſdiction.

But *note* well, that beſides this commiſſion founded upon the ſtatute of 28 *H.* 8. which extendeth only to treaſon, murder, robbery, and confederacies, there is, and for above theſe hundred years laſt paſt there hath been in the ſame commiſſion, a common law commiſſion of *oyer* and *terminer*, and alſo a commiſſion of the peace and gaol-delivery for all offenſes againſt any penal laws *ſuper mare, vel infra fluxum maris ad plenitudinem maris*; and alſo of all treaſons, murders, felonies, *&c. ſuper mari vel aliquo rivo, portû, aquâ dulci, crecâ, ſeu infra fluxum maris ad plenitudinem maris, à quibuſcunque primis pontibus verſus mare & ſuper littus maris, &c. ſecundum ſtylum & conſuetudinem regni* Angliæ *& curiæ admiralitatis*, and limits the county of their ſeſſion and inquiry. This may be ſeen at large in 25 *Eliz.* in *Lacie's* caſe *(e)*.

But then for ſo much as lies within the body of any county, their
[19] commiſſion is a commiſſion of the peace, gaol-delivery, and *oyer* and *terminer*, and conſequently plain commiſſions at common law, and their ſeſſions ought to be within the county where the fact inquirable is to be inquired, becauſe it is but a ſpecial commiſſion at common law.

The caſe of *Lacy* was thus:

Die Lunæ in quartâ ſeptimanâ Quadrageſimæ 23 *Eliz.* at the caſtle of *York*, there was a general ſeſſion by commiſſion of gaol-delivery and *oyer* and *terminer* for the county of *York* directed to baron *Chute* and others.

At this ſeſſion *Ambroſe Lacy* and others were indicted of the murder of *Richard Peacock*, ſuppoſing the ſtroke given 5 *Auguſt* 22 *Eliz.* and the death 6 *Auguſt* 22 *Eliz.* both ſuppoſed to be at *Scarborough, in commitatû Eboracenſi.*

This indictment was delivered into the king's bench *in menſe Martii* following, and *Lacy* appearing in the king's bench was thereupon arraigned: he pleaded that the place, where *Richard* was ſtricken and after died, was called *Scarborough-ſands*, and that it is and at the time of the ſtroke *& continuè poſtea fuit locus infra fluxum & refluxum maris infra plenitudinem ejus in* Scarborough *prædict', & parcella portûs de Scarborough*, and that within that place the admirals 28 *H.* 8. *& ſemper tam antea, quam poſtea habebant & prætendebant habere juriſ-*

(e) 1 *Leon.* 270.

dictionem;

dictionem; then ſhews the letters patents of *oyer* and *terminer* to baron *Chute* and others within the counties of *York*, *&c.* according to the uſual form, which was delivered to baron *Chute* and the reſt 18 *Feb.* 23 *Eliz.*

That afterwards 25 *Feb.* 23 *Eliz.* the commiſſion upon the ſtatute of 28 *H.* 8. including alſo the commiſſion of gaol-delivery, *oyer* and *terminer*, and the peace, *ut ſupra*, iſſued to the earl of *Lincoln*, lord admiral, and divers others, *&c.* to inquire, hear and determine, and deliver the gaol of all murders *tàm ſuper mare vel aliquo rivo, portû, aquâ dulci, crecâ, ſeu loco quocunque infra fluxum maris ad plenitudinem à quibuſcunque primis pontibus verſus mare, quàm ſuper littus maris & alibi ubicunque infra juriſdictionem noſtram maritimam & juriſdictionem curiæ admiralitâtis, &c.*

That this commiſſion was delivered to the lord admiral, *&c.* 26 *Feb.* 13 *Eliz.*

That afterward and before the inquiſition before baron *Chute*, *&c.* the lord admiral gave notice to the ſaid baron *Chute* of that commiſſion. [20]

And that after that notice, *viz.* 6 *Martii in quartâ ſeptimanâ Quadrageſimæ* this inquiſition was taken before baron *Chute*, *&c.* upon which he is now arraigned.

Then he ſhews, that 2 *Martii* 23 *Eliz.* the lord admiral, *&c.* iſſued their precept to the ſheriff of *York* by virtue of the ſecond commiſſion, and thereupon an indictment was found, that *Ambroſe Lacey* killed *Peacock ſe defendendo*, and ſet forth the ſpecial manner, and avers that it is the ſame death, and that the *locus*, *in quo* the ſtroke was given, was called *Scarborough-ſands infra fluxum & refluxum maris ad plenitudinem ejus, & parcellæ portûs de Scarborough*; and that the admiral 28 *H.* 8. *ac continuè poſtea & antea habebat vel pretendebat habere juriſdictionem, & ſic dicit quòd inquiſitio coram* baron *Chute fuit* void.

The king's attorney demurred, and *Mich.* 26 *Eliz.* judgment was given, *quòd eat ſine die.*

Which judgment doth not at all enforce, that the admiral had juriſdiction by the ſtatute of 28 *H.* 8. in this caſe, where a murder was committed in a port, or a ſtroke given at high ſea, and a death upon the ſands; but only this ſecond commiſſion extending ſo large, namely upon the ſea-ſhore and in the ports, did for ſo much repeal the

former commiſſion in the county at large; for *that* ſecond commiſſion was in part a common law commiſſion, as hath been ſaid.

And therefore I take it to be true, that if a man be ſtricken upon the ſhore at full ſea, and die upon the ſhore at low water, this is not within the ſtatute of 28 *H.* 8. nor within a general commiſſion of *oyer* and *terminer* in the county, but yet I do not think it is to be determined by the conſtable and marſhal, as my lord *Coke*, *ubi ſupra*, intimates, but it may be determined in the king's bench ſitting in the county, where the party died, or by a ſpecial commiſſion of *oyer* and *terminer*.

[21] III. The third kind of ſpecial commiſſion is, that which is limited to particular places, that are not counties: Such are the commiſſions of *oyer* and *terminer*, and likewiſe of gaol-delivery, or the peace limited and granted within certain corporations or boroughs; nay, I think it may be granted to particular rivers, tho they extend to ſeveral counties, but then every county muſt have a particular ſeſſion of its own, for ſo much of the river as is within the precinct of that county.

If the king iſſues a commiſſion of *oyer* and *terminer* or gaol-delivery to any city or town not being a county, if a general commiſſion afterwards iſſues for the whole county, this ſecond commiſſion after notice or a ſeſſion by virtue thereof determined and ſuperſeded the ſpecial commiſſion; but this is remedied by the ſtatute of 2 & 3 *P.* & *M.* *cap.* 18. whereby it is enacted, that ſuch a ſpecial commiſſion ſhall not be determined by the granting or ſitting of a general commiſſion in the county at large.

IV. Special commiſſions of *oyer* and *terminer* may be made for ſome ſpecial offenſes: And ſuch were antiently very uſual, as touching labourers, weights and meaſures, and the like; for as a general commiſſion may be to hear and determine all offenſes, ſo it may be for particular offenſes.

V. Special commiſſions to hear and not to determine offenſes: Tho by force of ſome particular ſtatutes ſuch commiſſions of inquiry may iſſue, as upon the ſtatute of 23 *H.* 6. *cap.* 10. of ſheriffs and ſome others, yet regularly as to matters of miſdemeanor, eſpecially ſuch as are capital, as felony or treaſon, no ſuch commiſſion of inquiry only is warrantable: *Vide T.* 5 *Jac.* 12 *Co. Rep. p.* 31.

VI. A commiſſion to determine and not to inquire: Regularly in all

all commiſſions *ad audiendum & terminandum* the commiſſioners ought to proceed upon indictments before themſelves; *de quo infra.*

But it hath been not unuſual in caſes, eſpecially of treaſon, that where an indictment is taken before juſtices of *oyer* and *terminer* for an offenſe committed in the proper county, a ſpecial commiſſion may iſſue to determine that indictment in another county, but then upon *not guilty* pleaded the ſame muſt be tried before [22] theſe ſecond commiſſioners, by men of the county where the offenſe was committed: *Vide Co. P. C. p.* 27. *Plowd. Com.* 390. *Caſus com'* Leiceſter and *Somervill's* caſe, *&c. (f).*

I ſhall not inſtance farther touching ſpecial commiſſions: Some acts of parliament have directed commiſſions of this nature, as upon the ſtatute for treaſons and felonies committed in another county by the ſtatute of 33 *H.* 8. *cap.* 23. (which, tho repeald as to treaſons by 1 *& 2 P. & M. cap.* 10. yet ſtands as to murders, and *vide Crompt. fol.* 22. *a. Grevill* examind before the council was arraigned for murder in another county upon this ſtatute (*), and ſtanding mute was preſſed,) and upon the ſtatute of 35 *H.* 8. *cap.* 2. of foreign treaſons.

Et hæc dicta ſunt de ſpecial commiſſions *d' oyer* and *terminer.*

See Index to 2 Hawk. P. C. tit Oyer and Terminer. 4 Blackſ. Com. ch. 5. p. 71. Foſter. 1.

CHAP. IV.

Concerning general commiſſions *of* oyer *and* terminer.

JUSTICES of *oyer* and *terminer* are of two kinds, *viz. Juſticiarii ordinarii*, ſuch is the court of king's bench, the ſupreme ordinary court of *oyer* and *terminer*, and is compriſed within the ſtatutes, that give power to juſtices of *oyer* and *terminer*, as hath been already ſaid.

The delegate or commiſſionate juſtices of *oyer* and *terminer* are thoſe, who are by commiſſion, which uſually is granted in the circuits directed to juſtices of aſſiſe and divers others, or any three of them, whereof commonly one of the juſtices of aſſiſe is of the *quorum*; and it is *ad inquirendum per ſacramentum proborum & legalium hominum* of the ſeveral counties *de quibuſcunque proditionibus, &c.* and [23] divers other offenſes therein mentiond, *ac de ominibus injuriis & male-*

(f) 1 *And.* 107. (*) This caſe was *M.* 31 *Eliz.*

malefactis quibuſcunque in comitatibus Bucks, *&c. eaque omnia audiendum & terminandum, facturi inde quod ad juſtitiam pertinet ſecundum legem & conſuetudinem regni* Angliæ, *&c.* and this to be done *tàm infra libertates quàm extra.*

This commiſſion is ſpecially called a commiſſion of *oyer* and *terminer*; and therefore, altho juſtices of peace have a clauſe in their commiſſion *ad audiendum & terminandum* felonies, *&c.* yet juſtices of peace come not under the name of juſtices of *oyer* and *terminer* within thoſe acts of parliament, that mention juſtices of *oyer* and *terminer*; as upon the ſtatute of 5 *Eliz. cap.* 14. for forgery, as ſhall be ſaid farther hereafter in the chapter of juſtices of peace. 9 *Co. Rep.* 118. *b.* lord *Sanchar's* caſe, *Co. P. C. cap.* 41. *p.* 103.

But the juſtices of the court of king's bench are the ſovereign ordinary commiſſioners of *oyer* and *terminer*, as hath been before ſaid.

My lord *Coke* in his 4 *Inſtit. cap.* 28 & 30. hath laid together the learning of the courts of *oyer* and *terminer* and gaol-delivery, whoſe method I ſhall follow

Commiſſioners of *oyer* and *terminer* before their ſeſſions, iſſue a precept to the ſheriff much of the ſame form as commiſſioners of gaol-delivery do; ſee the form thereof, *Raſt. Entries* 443. *b.* title *oyer* and *terminer*. 1 *E.* 3.

1. The juſtices of *oyer* and *terminer* in criminal cauſes cannot be by writ, but muſt be by commiſſion under the great ſeal; otherwiſe their proceedings are void. 42 *Aſſiz.* 12.

2. Both in commiſſions of *oyer* and *terminer* and of gaol-delivery, and other commiſſions of like nature directed to one or more, there may be additional commiſſions of aſſociation, and thereupon writs are to iſſue to the former commiſſioners *de admittendo in ſocietatem*; and if all cannot attend the ſeſſion, a writ of *Si omnes intereſſe non poſitis, tunc vos tres vel duo veſtrûm, quos præſentes eſſe contigerit, (quorum aliquem veſtrûm,* A. B. *vel* C. D. *unum eſſe volumus,) ad præmiſſa faciend' intendatis. &c. Vide F. N. B. p.* 111, 112.

[24] 3. Juſtices of *oyer* and *terminer* or gaol-delivery, if they once ſit without adjournment, their commiſſion is determined; but tho they be appointed only *pro hâc vice*, yet they may continue their ſeſſions from day to day by adjournment; the like for all other commiſſions.

But it is not always neceſſary nor uſual to enter their adjournment on record, (tho it might be fit in many caſes,) and then if it be not entered

entered on record, their ſeſſion always relates to the firſt day, and ſo are their records entered as of the firſt day of the ſeſſion.

But in ſome caſes it is abſolutely neceſſary to enter their adjournments on record, as where an indictment is taken the firſt day of the ſeſſion before juſtices of *oyer* and *terminer*, and they make a precept to the ſheriff to return a jury the next day, or at any following day, upon the priſoner's plea of not guilty, there muſt be a record made of the adjournment of the ſeſſions to that day, otherwiſe it will be erroneous, (becauſe without ſuch entry the whole ſeſſions will be ſuppoſed in law to be held the firſt day,) and out of the ſeſſions; the like for juſtices of peace.

So if after the firſt day of the ſeſſions either of *oyer* and *terminer*, or gaol-delivery, there be a felony committed, and the party indicted for it, there muſt be an entry of the adjournment, at leaſt till the day of the indictment taken, becauſe otherwiſe the felony will be ſuppoſed in law to be committed after the determination of the ſeſſions. 14 *Car.* 1. *Sampſon*'s caſe *(a)*.

4. Commiſſions of *oyer* and *terminer*, gaol-delivery, and regularly all other commiſſions are determined by one of theſe four ways. 1. By a ſeſſion and non-adjournment, as before. 2. By the king's death: yet it is held, tho in ſtrictneſs of law the commiſſions be determined by the king's death, ſo as no proclamation without an act of parliament can give them continuance, but they muſt have new commiſſions, *Croke*, 1 *Car.* 1. *p.* 1. yet the acts they do by virtue of theſe commiſſions after the king's death, and before notice thereof, ſtand good. *M.* 3 *Car. C. B. Croke*, *p.* 97, 98. in Sir *Randolph Crew*'s caſe (*). 3. By expreſs *Superſedeas* by a writ; but this *Superſedeas* by writ, tho it be a *Superſedeas omnino*, yet [25]

(a) W. Jones, 420.

(*) But now by 7 & 8 *W. cap.* 27. and 1 *Ann, cap.* 8. it is enacted, "That no "commiſſion either civil or military, "That no patent or grant of any office or "imployment either civil or military, "That no commiſſion of aſſiſe, *oyer* and "*terminer*, general gaol-delivery, or of "aſſociation, writ of admittance, writ of "*ſi non omnes*, writ of aſſiſtance, or com- "miſſion of the peace ſhall be determind "by the demiſe of any king or queen of "this realm, but ſhall continue in full "force for ſix months next enſuing not- "withſtanding ſuch demiſe, unleſs ſuper- "ſeded and determind by the next ſuc- "ceſſor; And alſo no original writ, writ "of *Niſi prius*, commiſſion, proceſs, or "proceedings whatſoever in, or iſſuing "out of any court of equity, nor any "proceſs or proceeding upon any office "or inquiſition, nor any writ of *Certio rari*, "or *Habeas Corpus* in any matter or cauſe "either criminal or civil, nor any writ "of attachment, or proceſs for contempt, "nor any commiſſion of delegacy, or re- "view for any matters eccleſiaſtical, teſ- "timentary, or maritime, or any proceſs "thereupon ſhall be determind, abated or "diſcontinued by the demiſe of any king "or queen of this realm, but ſhall remain "in full force, as if ſuch king or queen "had lived.

is not an abſolute repeal of the commiſſion, but only a ſuſpenſion, for it may be renewed again by a writ of *Procedendo*, 12 *Aſſiz.* 21. adjudged. 4. By the iſſuing a new commiſſion of the ſame nature in the ſame county, and notice thereof.

And therefore before the former commiſſion be determind, there muſt be notice, which is, of three kinds. 1. By ſhewing the new commiſſion; this determines the former, as to all thoſe and thoſe only to whom it is ſhewn. 2. By a proclamation of the latter commiſſion in the county; this determines the former commiſſion wholly. 3. By a ſeſſion in the county by force of the latter commiſſion in the county. *Coke*, 4 *Inſtit. cap.* 28. *p.* 165.

If a general commiſſion of *oyer* and *terminer*, gaol delivery, or the peace, iſſue for the county at large; and afterwards a ſpecial commiſſion of the like nature for one town, or for the *loca maritima* of that county, this new commiſſion, with notice as before, doth determine the general commiſſion *pro tanto*. 25 *Eliz. Lacie*'s caſe, 1 *Leon.* n. 363. *p.* 270. *& ſupra, cap. præcedente.*

And ſo *è converſo*, if a ſpecial commiſſion of *oyer* and *terminer*, gaol-delivery, or the peace, iſſue for a particular town or city, not being a county, or for the *loca maritima*, a general commiſſion of like nature in the county, with ſuch a notice as before, determines the ſpecial commiſſion: But by the ſtatute of 2 & 3 *P. & M. cap.* 18. this is helped as to ſpecial commiſſions in cities and towns corporate, as hath been before ſaid; but *that* ſtatute is to be intended only of towns or cities, as it ſeems, *(quære)* and extends not to commiſſions of *oyer* and *terminer*. 4 *Co. Inſtit. p.* 165. *in margine.*

[26]

But if there be a general commiſſion of *oyer* and *terminer*, or gaol-delivery, or peace for the whole county, and a ſpecial commiſſion of the ſame nature to a liberty, hundred, or other precinct, as in a hundred, liberty, or franchiſe within the county, and both bear *teſte* the ſame day, they all ſtand. Thus it is in *Suffolk*, where there have been always three commiſſions of gaol-delivery to the juſtices of aſſize, one for the county at large, another for the franchiſe, another for the town of *Bury*, and they impanel ſeveral grand juries, and ſit and act reſpectively by each commiſſion.

And the juſtices of gaol-delivery in the franchiſe muſt ſit in the franchiſe by the ſtatute of 27 *H.* 8. *cap.* 24. and the reaſon is, becauſe antiently the abbots of *St. Edmund's-Bury* did by virtue of the king's letters patent,

patent, conſtitute their own juſtices of gaol-delivery in the franchiſe and town; and therefore the ſeſſions of gaol-delivery is fitteſt to be held at *Bury*; but the commiſſion of *oyer* and *terminer* extends *tàm infra libertates, quàm extra*; but of this *vide cap. prox.*

But a commiſſion of one nature doth not ſuperſede a commiſſion of another nature, as a commiſſion of *oyer* and *terminer* is not repealed by a ſubſequent commiſſion of gaol-delivery or the peace, nor *è converſo*, for they are of ſeveral natures. 3 *Mar. B. Commiſſion* 24.

Theſe things before-mentiond are common to all judiciary commiſſions; theſe that follow, more particularly concern general commiſſions of *oyer* and *terminer*.

1. Regularly upon the commiſſion of *oyer* and *terminer* there ſhould iſſue a precept to the ſheriff in the name of three commiſſioners at leaſt, whereof one of the *quorum*, and under their particular ſeals, bearing date fifteen days at leaſt before their ſeſſion, to the ſheriff to return twenty-four for a grand inqueſt *ad inquirendum, &c.* at ſuch a day; and the ſheriff is to return his pannel annexed [27] to the precept.

2. Regularly the commiſſioners of *oyer* and *terminer* cannot proceed upon any indictment taken before others than themſelves. 3 *Mar. B. Commiſſion* 24. And therefore they cannot proceed upon the coroner's inqueſt, or upon an indictment of felony before juſtices of peace.

But this rule hath two exceptions. 1. That it is only intended of a general commiſſion of *oyer* and *terminer*, for, as hath been ſhewn, there may be a ſpecial commiſſion to determine a treaſon or felony taken before other commiſſioners of *oyer* and *terminer*, *Plowd. Com. p.* 390. *Caſus com' Leiceſt.*; nay, or by the coroner or juſtices of the peace. 2. That it doth not extend to an inquiſition taken before other commiſſioners of *oyer* and *terminer*; for it is and always hath been the conſtant practice to take indictments before commiſſioners of *oyer* and *terminer*, as for highways, barretry, forgery, perjury, *&c.* and to try them before other commiſſioners of *oyer* and *terminer* at another ſubſequent ſeſſions; and if there were any doubt of that at common law, yet the ſtatute of 1 *E.* 6. *cap.* 7. hath ſettled it, *viz.* "That no proceſs or ſuit made before the juſtices of aſſiſe, gaol-"delivery, *oyer* and *terminer*, juſtices of peace, or any the king's "commiſſioners, ſhall be in any wiſe diſcontinued by making or "publiſhing any new commiſſion or aſſociation, or by altering the

" names of the juſtices; but the new juſtices of aſſiſe, gaol-delivery " and the peace, or other commiſſioners may proceed in every be- " half, as if the old commiſſions, juſtices and commiſſioners had ſtill " remaind and continued not alterd.

And this gives power to the juſtices of *oyer* and *terminer*, *&c.* to proceed upon indictments taken by former juſtices of *oyer* and *terminer*, as well in caſes of treaſon or felony, as other miſdemeanors.

3. In caſe where a felon or traitor, *&c.* pleads to an indictment taken before juſtices of *oyer* and *terminer*, they ought not, (as in caſe of juſtices of gaol-delivery,) to award a precept *ore tenus* to the ſheriff to return a jury, but it muſt be by precept in the names [28] and under the ſeals of the commiſſioners, or three of them, whereof one of the *quorum*. 4 *Co. Inſtit. cap* 30. *p.* 168. *& ibidem cap.* 28. *p.* 164. and the ſheriff ought to return the pannel filed to the precept.

4. But the indictment may be preferred, iſſue joined, precept made and returned, and priſoner tried the ſame day before commiſſioners of *oyer* and *terminer:* ſee the precedents cited 4 *Co. Inſtit. cap.* 28. *p.* 164. *P.* 16 *Car.* 1. *B. R. Croke* 583. reſolved *per omnes Juſticiarios Angliæ*, altho there were no commiſſion of gaol-delivery in that caſe, but only of *oyer* and *terminer*. *Accords H.* 9 *Car. B. R. Chapman*'s caſe for barretry before juſtices of *oyer* and *terminer*. 2 *Roll. Abr. p.* 96. And the ſame law is queſtionleſs for juſtices of gaol-delivery. *T.* 9 *Car. B. R. Croke* 315.

But in caſes of juſtices of the peace it hath been held, that they cannot try the ſame ſeſſion that the party pleads to the indictment, much leſs the ſame he is indicted. 22 *E.* 4. *Coron.* 44. *H.* 11 *Car.* 1. *B. R. Croke, p.* 438 *&* 448. adjudged in caſes not capital, *Bumpſted*'s caſe in an indictment of extortion, and accordingly ruled *T.* 23 *Car. B. R. Pue*'s caſe for ſeditious words. 2 *H.* 8. *Kelw.* 259.

But yet it hath been held good even before juſtices of peace to receive an indictment, and put the party, if preſent, to plead to it, and try it the ſame ſeſſions, *T.* 14. *fac. B. R. Cro.* 404. *Rite*'s caſe adjudged good, 4 *Co. Inſtit. cap.* 28. *p.* 164. *without queſtion they may:* And there can be no difference aſſigned between ſeſſions of the peace and *oyer* and *terminer* in this caſe, nor between cauſes criminal and capital, for the offenſes riſe in the ſame county, and as there goes out a ſummons of gaol-delivery, ſo there iſſues a general ſummons

mons of the ſeſſions of the peace; and that all conſtables, &c. then attend; *quod vide Crompt. de pace, f.* 232. *a.* 2 *Co. Inſtit. ſuper Articulis, cap.* 15. *p.* 568.

Yet in reſpect of this contrariety of opinion, the uſe hath commonly obtaind, that in caſes not capital both before juſtices of *oyer* and *terminer*, and of the peace, he that traverſeth an indictment, hath time to try it till the next ſeſſion; but where the party is in priſon, the juſtices of gaol-delivery put him to anſwer, and try it preſently. [29]

But in all treaſons and felonies, as well before juſtices of *oyer* and *terminer* or of peace, as well as before juſtices of gaol-delivery, the conſtant courſe is to indict the party, put him to plead, try him, and give judgment, and all at the ſame ſeſſions; and it is fit to hold the courſe according to the modern uſage; but it ſeems to me, that in all caſes criminal or capital, juſtices of *oyer* and *terminer* may *de rigore juris* proceed to indictment, trial and judgment the ſame ſeſſions.

5. The court of the general commiſſioners of *oyer* and *terminer*, as likewiſe that of the gaol-delivery and of aſſiſe, comes under the name of a court of record in relation to thoſe offices, that by act of parliament are directed to be puniſhed in any court of record; as the ſtatute of 5 & 6 *E.* 6. *cap.* 14. of foreſtallers, &c. and the ſtatute of 33 *H.* 8. *cap.* 9. of unlawful games, by the opinion of my lord *Coke*, 4 *Inſtit. cap.* 28. *p.* 164. and according to him, if it be limited to be puniſhed in any of *his majeſty*'s courts of record.

But there is a great authority againſt this, and that in ſuch caſes, eſpecially the latter, it only extends to the four great courts at *Weſtminſter*. as upon the ſtatute of drapery, 4 & 5 *P.* & *M. cap.* 5. which is, that the penalties of that act ſhall be recoverd by action, bill, plaint or information, or otherwiſe *in any court of record*, wherein no eſſoin, protection, wager of law, or injunction ſhall be allowd; this extends only to the four courts of *Weſtminſter*, *Gregory*'s caſe, 6 *Co. Rep. f.* 19. *b.* of tillage, labourers, &c. *(e) to be recoverd in any of the queen's courts of record*, by the opinion of all the judges except *Catlin*, *Sanders* and *Whiddon*, extends only to the four courts of *Weſtminſter*, and not to commiſſioners of *oyer* and *terminer*; but otherwiſe it is, if no court be appointed. *M.* 6 & 7 *Eliz. Dy.* 236. *a.*

(a) 5 *Eliz. cap.* 4.

Again,

Again, by the ſtatute of 23 *H.* 8. *cap.* 4. againſt brewers for ſelling
[30] beer by leſs meaſure than is appointed by the act, the penalty half to the king half to the informer, to be recoverd by action of debt, bill, plaint, or information *in any of the king's courts*, wherein no wager of law, eſſoin, protection or privilege ſhall be allowd, *T.* 4 *Car. C. B. Croke, p.* 112. *Farrington*'s caſe: Ruled, that notwithſtanding the ſtatute of 21 *Jac. cap.* 4. this information lies in the common bench, becauſe the juſtices of *Niſi prius*, *oyer* and *terminer*, or of the peace, or gaol-delivery cannot hold plea upon this ſtatute, becauſe theſe juſtices cannot allow an eſſoin or protection; and the ſtatute of 23 *H.* 8. extends only to ſuch courts as can allow a protection, *&c.* and accordingly I have known it reſolved upon the ſtatute of 7 *E.* 6. *cap.* 5. for wines; and about 23 *Car.* 2. it was reſolved upon a writ of error in the exchequer-chamber, upon a judgment given in the exchequer for *Foly* a defendant in an information upon the ſtatute of 1 *Eliz. cap.* 15. (whereby the cutting of timber within fourteen miles of a navigable river is prohibited on pain of forfeiting of forty ſhillings for every tree, a moiety to the queen, and a moiety to the informer, to be recovered by original writ, bill, plaint or information, wherein no eſſoin, protection, wager of law, or injunction ſhall be allowd,) that this extends not to the commiſſioners of *oyer* and *terminer*, nor other courts in the country, but only to the four courts at *Weſtminſter*. 1. Becauſe original writs are not returnable before them. 2. They cannot allow or diſallow profections or eſſoins; whereupon the judgment for coſts was affirmed; and yet here is no mention of *any court*, or *court of record*, or *his majeſty's courts*, but purely upon theſe two reaſons.

And yet I believe hundreds of informations have been before juſtices of *oyer* and *terminer* and *aſſiſe*, yea and of the peace in the country upon ſeveral acts, that have the like clauſes, as 35 *H.* 8. *cap.* 7. for the preſervation of woods, and infinite others according to my lord *Coke*'s opinion, but when it hath come to be judicially debated, I have not known it to obtain; but the reſolution in *Farrington*'s caſe and in *Gregory*'s caſe have ſtill been allowd.

[31] 6. Commiſſioners of *oyer* and *terminer* cannot aſſign a coroner to an approver, nor juſtices of peace, but juſtices of gaol delivery may. 4 *Co. Inſtit. p.* 165. *Stamf. P. C. p.* 143. *b.*

7. By the ſtatute of 5 *E.* 3. *cap.* 11. juſtices of *oyer* and *terminer* may iſſue proceſs of outlawry in any county of *England* againſt perſons

perſons indicted before them, and alſo a *capias utlegatum* againſt perſons outlawed.

8. By the ſtatute of 9 *E.* 3. *cap.* 5. juſtices of *oyer* and *terminer*, gaol-delivery, and aſſiſe are to ſend their records and proceſſes determind and put in execution to the exchequer at *Michaelmas* once every year under their ſeal, to be kept by the treaſurer and chamberlains, but are to take out their eſtretes firſt.

9. All the precepts and proceſſes of juſtices of *oyer* and *terminer* regularly are to be in the names and under the ſeals of the juſtices (*viz.* three of them, one of the *quorum*); and altho at this day there is no other warrant for the execution of priſoners condemned, but a calendar left with the ſheriff under the hand of the juſtice that ſits, yet antiently there was a warrant under their hands and ſeals, and in the names of the commiſſioners. *Co. P. C. p.* 31.

But if the priſoner be in cuſtody of the ſheriff, the truth is, there is no need of any warrant or calendar, for the open pronouncing and entring of the judgment *Suſpendatur* is a warrant for the execution, and ſo it is in the king's bench, the entry on record of the judgment with a *præceptum eſt mareſcallo quòd faciat executionem periculo incumbente*, without any formal writ or precept of the court is ſufficient, and more is not uſual: and the calendar ſubſcribed by the judge of gaol-delivery is but a memorial; and *Rolle* would never ſign any calendar, but gave his orders openly in court with a charge to the ſheriff and gaoler to take notice of them.

More may occur touching theſe matters in the next chapter.

See Index to 2 Hawk. P. C. tit. Oyer and Terminer.

CHAP. V. [32]

Touching juſtices of gaol-delivery.

THIS court is by commiſſion under the great ſeal directed commonly to five or any two of them, *quorum aliquem veſtrûm* A. B. *vel* C. D. *unum eſſe volumus ad gaolam noſtram comitatûs noſtri* S. *de priſonibus in eâ exiſtentibus deliberandis*; ſee the whole tenor of the commiſſion. 4 *Co. Inſtit. cap.* 30. *p.* 168.

1. By

1. By the ſtatute 8 *R.* 2. *cap.* 2. no man of law ſhall be juſtice of aſſiſe or common deliverance of the gaol in his own country; this ſtatute is expounded by 33 *H.* 8. *cap.* 24. to be meant of the county, where he dwelleth; and as to juſtices of aſſiſe a penalty of one hundred pounds is added, if he exerciſes that office in the county where he is born or doth inhabit; but both theſe acts are uſually diſpenſed with by a ſpecial *non obſtante.*

By a ſpecial privilege by charter granted to the city of *London* the lord mayor is of the *quorum*, 2. *R.* 3. 11. *a.* and ſo it is in the city of *Norwich.*

2. Juſtices of gaol-delivery may proceed againſt priſoners (if in gaol) upon inquiſition before the coroner or any other juſtices; and therefore juſtices of peace muſt ſend in their indictments not determind unto the juſtices of gaol-delivery to be proceeded upon, whether they be felonies or treſpaſſes, if the party be in gaol or ſet to bail. *Stat.* 4 *E.* 3. *cap.* 2.

3. The juſtices of gaol-delivery after their commiſſion ſealed do, or ſhould iſſue a precept to the ſheriff importing theſe things, *viz.*

1. That upon ſuch a day and place, *Venire facias omnes priſones in priſonâ domini regis com' prædict' exiſtentes vel per ipſum per manucaptionem dimiſſ. cum eorum attachiamentis & omnibus aliis eorum deliberationem tangent' & penes ſe remanent'.* 2. *Quòd Venire facias* at the day and place 24 *legales homines de quolibet hundredo & inquirendum pro domino rege & corpore comitatûs prædicti.* 3. *Ac alios* 24 *probos & legales homines de comitatu prædicto ad faciendam juratam inter dominum regem & priſones prædictos.* 4. *Et proclamari facias dictam deliberationem gaolæ in omnibus civitatibus, burgis & aliis locis, quòd omnes, qui ſequi voluerint verſus priſones prædictos pro domino rege vel ſe ipſis, adtunc ſint ibi in formâ juris proſecuturi.* 5. *Scire facias etiam omnibus Juſticiariis ad pacem comitatûs prædicti, coronatoribus, capitalibus conſtabulariis pacis, majoribus, ballivis, ſeneſcallis magnatûm, ballivis hundredorum & libertatûm, quòd tunc ſint ibi ad faciendum quod ad officium ſuum pertinet, & tu adtunc ſis ibi unà cum ballivis & miniſtris ſuis ad faciendum ea, quæ tuo & eorum officio incumbunt.* 6. *Et habeas ibi tàm nomina Juſticiariorum ad pacem, coronatorum, capitalium conſtabulariorum pacis, ſeneſcallorum magnatûm, ballivorum hundredorum & libertatûm, quàm juratorum prædictorum, & hoc præceptum.*

[33]

This

This precept is made in the king's name, or in the name of the juſtices of gaol-delivery, *Vide formam inde Raſt. Entries; p.* 385. *a. Gaol-delivery* 1. *Venire facias de quolibet hundredo* 24 *tâm milites, quàm alios* (*) *& de qualibet villatâ, ubi dicti priſones indictati exiſtunt, quatuor homines & præpoſitum ad faciendum ea, quæ ex parte domini regis tunc ibidem injungentur.*

This is not unlike the ſummons of the *Iters* formerly, nor altogether unlike the ſummons of the ſeſſions of the peace, *quod vide Crompton de Pace, p.* 232. *a.* which is in the king's name, and ſo may this, with the *Teſte* of the chief juſtice: Or it ſeems it may be in the name of the juſtices of gaol-delivery and under their ſeal; *vide ſimile* in *Holcroft's* caſe, *Co. Entries* 55. by the juſtices of gaol-delivery for the verge; this precept is accordingly returned, the juſtices of peace, coroners, mayors, bailiffs of hundreds, and liberties, conſtables of hundreds, and names of the grand inqueſt returnd and called in order.

4. And therefore it hath never been a queſtion, but that the juſtices of gaol-delivery may take an indictment, try, and give judgement the ſame day. 22 *E.* 4. *Coron.* 44. [34]

5. But altho this ſolemnity of ſummons of the gaol-delivery may be, and ſhould be uſed, yet they may command the ſheriff *ore tenus*, to return a pannel without any precept in writing to him, (as is neceſſary in caſe of juſtices of *oyer* and *terminer,)* and the reaſon is given, becauſe there is a general command to the ſheriff by the ſummons of the gaol-delivery to return twenty-four to try priſoners. 4 *H.* 5. *Enqueſt* 55. 4 *Co. Inſtit. cap.* 30. *p.* 168.

6. They may deliver by proclamation perſons impriſond, where either no indictment is preferd, or an indictment preferd and *ignoramus* found, which is ſaid cannot be done by juſtices of *oyer* and *terminer*, or of the peace. 2 *R.* 3. *Corone* 47.

7. They may originally take indictments of felony of ſuch priſoners as are in gaol; this hath been accordingly reſolved and is the conſtant practice, and ſo may juſtices of *oyer* and *terminer:* So that when the priſoner is in gaol, both have a concurrent juriſdiction. 4 *Co. Inſtit. cap.* 30. *p.* 168 & 169. and accordingly it was reſolved in the caſe of *Apharry* and *Morgan*, *P.* 29 *Eliz.* there cited. And therefore the caſe of 3 *Mar. B. Commiſſion* 24. and *Paſch.* 32 *Eliz.*

(*) The words in *Raſtal* are *libros & legales homines.*

B. R. Purſell's caſe, *Croke, n.* 10 *p.* 179. wherein it is ſaid, that juſtices of gaol-delivery cannot take an indictment, unleſs they be alſo juſtices of peace, and then they may take an indictment as juſtices of peace, and try him as juſtices of gaol-delivery, is to be intended, where the offender is at large and out of priſon, for if he be in priſon, the indictment againſt him may be taken before them as juſtices of gaol-delivery, or as juſtices of *oyer* and *terminer*, or of the peace.

8. And therefore juſtices of *oyer* and *terminer*, gaol-delivery, and of the peace may make up their record by all three of the powers; and if it be good by one commiſſion or by the other, it is good and not erronious, and the beſt ſhall be taken for the king. 9 *H.* 7. 9. *a.* 3. *Mar. B. Commiſſion* 24. *Cromp. Juriſdiction de Courts* 226.

[35] 9. If a perſon be let to bail, yet he is in law, in priſon, and his bail are his keepers, and therefore the juſtices of gaol delivery may take an indictment againſt him, as well as if he were actually in gaol; but he that is let to mainpriſe is not in cuſtody, 21 *H.* 7. 33. *a.* 9 *E.* 4. 2. a. 39 *H.* 6. 27. *b.* in the one caſe the entry is *traditur in ballium.* in the other *deliberatur per manucaptionem.*

10. They may take an indictment againſt perſons for high treaſon, if they be in gaol, and may try and give judgment upon them, as well as commiſſioners of *oyer* and *terminer* againſt the opinion delivered *H.* 15 *Jac. B. R. Bumpſted's* caſe.

This appears by the ſtatute of 1 *E.* 6. *cap.* 7. *vide* 4 *Co. Inſtit. p.* 169. *& libros ibi*, and it is conſtant experience.

11. By the ſtatute of 1 *E.* 6. *cap.* 7. the ſubſequent commiſſioners of gaol-delivery have power to give judgment upon a perſon reprieved after conviction, and altho it be made a *quære*, *Dy.* 205. *a.* whether they may as well award execution upon a judgment given by the former commiſſioners of gaol-delivery, *&c.* yet it ſeems to be without queſtion they may. 1. Upon the very common law, if a perſon be indicted and outlawed for felony before juſtices of peace, yet if he be in priſon the juſtices of gaol-delivery have power to award execution upon that outlawry, for they are conſtituted *ad gaolam deliberandam* 15 *H.* 7. 5. *b.* agreed, and certainly if there had been any doubt of that, the ſtatute of 1 *E.* 6. would have made as ſpecial a proviſion for awarding execution upon a judgment given by former commiſſioners, as for giving judgment upon a conviction before them. 2. But if there were any doubt thereof at common law, yet the ſtatute of 1 *E.* 6. *cap.* 7. hath ſufficiently enabled them thereunto by the laſt clauſe thereof,

thereof, *viz.* that notwithſtanding the altering of the commiſſions of aſſiſe, *oyer* and *terminer*, gaol-delivery, or the peace *the new juſtices may proceed in every behalf, as if the old commiſſions or commiſſioners had continued not alterd.*

12. They may receive appeals by bill againſt any perſon being in gaol.

13. They may aſſign a coroner to an approver, and make out proceſs againſt the appellee in a foreign county by the ſtatute of 28 *E.* 1. [36]

14. The ſheriff is to deliver unto the juſtices of gaol-delivery the names of all perſons in gaol, or that are bailed or let to mainpriſe by him for felony by the ſtatute of 3 *H.* 7. *cap.* 3.

15. If a ſtatute limit ſpecially an offenſe to be heard and determind by the juſtices of peace, as that of 3 *H.* 8. *cap.* 5. it is doubtful whether juſtices of gaol-delivery, yea of *oyer* and *terminer* may hear and determine it; but upon the ſtatute of 7 *H.* 7. *cap.* 1. which ſpeaks only of juſtices in the county, either the commiſſioners of *oyer* and *terminer* or gaol-delivery may hear and determine it.

16. By the ſtatute of 3 *H.* 8. *cap.* 12. The juſtices of gaol-delivery or of the peace, have power in open ſeſſion to reform all pannels returnd before them, by putting out and putting in names of perſons, which pannels ſo reformed, ſhall be accordingly returnd by the ſheriff: And *note*, this command is *ore tenus.*

And hence it comes to paſs, that altho upon trials of felons in the king's bench, or *oyer* and *terminer*, if the priſoner challenge twenty peremptorily, as he may, ſo that there be not ſufficient remaining of the pannel, there is to be a *Tales* granted by precept returnable as the caſe requires; yet before juſtices of gaol-delivery the priſoner gets no time by it, for the ſheriff by the command of the court *ore tenus*, may enlarge the pannel without any formal precept: *Vide Stamf. P. C. Lib.* III. *cap.* 5. *fol.* 155. *b.* and therefore *Tales* are not granted by precept before juſtices of gaol-delivery, which much expedites all buſineſs before them.

17. By the ſtatute of 9 *E.* 3. *cap.* 5. The records before them determind are to be deliverd to the treaſurer and chamberlains of the *Exchequer* at *Michaelmas* yearly.

18. By the ſtatute of 34 *H.* 8. *cap.* 14. The clerks of the crown, clerks of aſſiſe, and clerks of the peace are to certify into the king's bench

bench the names of all perſons outlawed, attainted, or convicted, and
[37] upon letter from the juſtices aforeſaid certificates ſhall be made of ſuch perſons outlawed, attaint, or convict, to the juſtices of gaol-delivery.

19. Juſtices of gaol-delivery may ſend priſoners by *Habeas Corpus* to the ſheriff of another county, and a precept to the ſheriff of that other county to receive them, namely, for a felony committed in that county, tho that county be out of the circuit of the juſtice that ſends them; and tho I once knew it ſcrupled, yet I think the law is clear in it; *vide* 1 & 2 *P.* & *M. cap* 13. *in fine*; for of neceſſity the juſtices of gaol-delivery have in ſome caſes power out of the precincts of their county or circuit; as where an approver appeals a perſon in a foreign county, and this is certified, as it ought, to the juſtices of gaol-delivery, where the approver is, the juſtices of gaol-delivery, may make out proceſs of *capias*, and it ſeems alſo of *exigent* againſt the appellee, and yet he is neither in gaol nor in the ſame county. 29 *E.* 3. 42. *a. Corone* 462.

But upon an inquiſition before the coroner returnd before juſtices of gaol-delivery they cannot make proceſs of outlawry: *vide petitionem indè in parliamento*, 29 *E.* 3. n. 22. *ſed non obtinuit*; but the anſwer was only, *Soit l' auncient ley ſur ceo uſe.*

20. *A.* and *B.* are indicted before the juſtices of peace of *Middleſex*, and according to the ſtatute of 4 *E.* 3. *cap.* 1. the indictment is deliverd over to the juſtices of the gaol-delivery of *Newgate*: *A.* appears and is tried and acquitted, *B.* appears not. 1. The juſtices of peace cannot make out proceſs againſt *B.* becauſe the record is not before them. 2. The juſtices of gaol-delivery cannot make out proceſs returnable before the juſtices of the peace, becauſe another court. 3. By ſome opinions the juſtices of gaol-delivery may make out proceſs to the outlawry returnable at the next ſeſſions of gaol-delivery; but others thought they had no ſuch power, for their commiſſion is to deliver the gaol, and not to iſſue proceſs againſt them that are out of gaol, neither can they proceed to the outlawry before themſelves, as commiſſioners of *oyer* and *terminer*, becauſe the indictment was taken before other juſtices, *viz.* of the peace: It was therefore held the
[38] entire record muſt be removed into the king's bench by *certiorari*, and from thence proceſs of outlawry may go againſt *B. T.* 11. *Car. B. R.* 2 *Rol. Abr.* 96. *Storie's* caſe, who in this caſe

was

was outlawed before the juſtices of peace, and the outlawry therefore reverſed.

21. By the ſtatute of 26 *H.* 8. *cap.* 6. The juſtices of peace and gaol delivery in the counties adjacent to *Wales* have power to hear and determine counterfeiting, waſhing, or clipping of coin, murder, burnings of houſes, manſlaughter, robbery, burglary, rapes, and other felonies, and the acceſſaries thereof committed in *Wales*, or any lordſhip marcher, *&c.* as if committed in the ſame adjacent county: This is repeald as to treaſons by the ſtatute of 1 *&* 2 *P. &* *M. cap.* 10. but ſtands in force as to other felonies.

22. By the ſtatute of 27 *H.* 8. *cap.* 24. The power of making juſtices of *eyre*, of aſſiſe, gaol-delivery, and of the peace in counties palatine and franchiſes is reſumed, and the ſame are to be made by letters patents under the great ſeal of *England.*

But they ſhall hold their ſeſſions only within ſuch franchiſes and liberties, and in none other places, as the juſtices of the ſaid liberties lately have commonly uſed within the ſaid liberties; and that no perſon within the ſaid liberties be compellible by authority of this act to appear out of the ſame before other juſtices of aſſiſe, gaol-delivery, or of the peace, than thoſe named by the king to ſit within the ſaid liberties.

By this ſtatute, 1. Theſe juſtices ſitting within exempt franchiſes or counties palatine are now the king's courts and the king's juſtices, and therefore a *certiorari* iſſuing out of the king's bench to theſe juſtices ſitting in *Durham* or the *cinque-ports* ought to be obeyed as by other juſtices out of franchiſes. 2. That yet where franchiſes of this nature were antiently granted to abbots to make juſtices of gaol-delivery to ſit within franchiſes, as for inſtance in the franchiſe of *St. Edmunds-Bury*, there is a ſpecial commiſſion of gaol-delivery for that franchiſe. 3. That this reſtriction of ſitting within the franchiſe extends not to the commiſſion of *oyer* and *terminer*, for that extends *tàm infra libertates, quàm extra*, and therefore may ſit out of a franchiſe, and determine miſdemeanors within the franchiſe: And this [39] I did once in a ſeſſion in the county of *Suffolk*, which by reaſon of ſickneſs at that time, could not be held in *Bury*, *viz.* I kept the ſeſſion for the whole county by virtue of the commiſſion of *oyer* and *terminer*. 4. This reſumption extends not to cities and boroughs, but they are ſpecially excepted, and particular proviſion for the biſhops of *Ely*,

Durham and *York*, to be juſtices of the peace only within their franchiſe.

23. By the ſtatute of 6 *R.* 2. *cap.* 5. they are to hold their ſeſſions in the principal towns, where the county-court is held; but this is but directive not coercive, for the judges may, and uſually have appointed their ſeſſions at their pleaſure in other places.

4. Blackſ. Com. ch. 19. p. 269. 270. See Index to 2 Hawk. Tit. Gaol-delivery.

CHAP. VI.

Touching the power of juſtices of aſſiſe *and* niſi prius, *with relation to felony.*

THE ſettled courſe of granting *niſi prius* was by the ſtatute of 27 *E.* 1. *de finibus, cap,* 3.

By the conſtruction made of that ſtatute, if a man be indicted in the country, and that indictment removed by *certiorari*, and the body of the priſoner by *habeas corpus* into the king's bench, and there he pleads *not guilty*, after that ſtatute and before the ſtatute of 6 *H.* 8. *cap.* 6. the tranſcript of the record might be ſent down by *niſi prius* to try that iſſue. 22 *E.* 4. 19. 5 *Mar. B. Coron.* 231. Statute 42 *E.* 3. *cap* 11. 4 *Co. Rep.* 43. *b. Bibith*'s caſe.

And the like may be done in an appeal, 21 *H.* 7. 34. *a.* 2 & 3 *P. & M. Read*'s caſe, *Dy.* 120. *a. Raſt. Entries* in title *Appeal per totum*, 8 *H.* 5. 6. *Coron.* 463.

[40] Upon the ſtatute of 27 *E.* 1. *cap.* 3. and the ſtatute of 14 *H.* 6. *cap.* 1. there hath been variety of opinions touching their power in caſes of felony: Some have thought, that by virtue of thoſe ſtatutes they had originally a power to hear and determine felonies without any other commiſſion, tho' as to treaſon concerning coin, upon the ſtatute of 3 *H.* 5. *cap.* 7. it is expreſly directed, that they ſhall have a commiſſion for the hearing and determining that offenſe; thus *Stamf. Lib.* II *cap.* 5. *f.* 57 & 58. Againſt, others have thought, that they have not any ſuch original power without a ſpecial commiſſion enabling them to hear and determine felonies originally; but that commiſſion, as it ſeems by the ſtatute of 27 *E.* 1. *cap.* 3. is called *a writ*, but is in truth no other than a commiſſion, for all aſſociations are commiſſions; and then the naming of them juſtices of

niſi

niſi prius is nothing elſe but the deſcription of thoſe perſons, to whom commiſſions of gaol-delivery ſhall be directed, and ſo they are no other but juſtices of gaol-delivery.

Others have thought, and that truly, that the juſtices of *niſi prius* have not any original power of hearing and determining indictments of felony without a ſpecial commiſſion for that purpoſe, but that by virtue of the acts of 27 *E.* 1. and 14 *H.* 6. they have a power to determine ſuch felonies only, as are ſent down to trial before them; as they have power by the ſtatute of *Weſtm.* 2. *(a)* to give judgment in aſſiſes of *darrein preſentment* and *quare impedit*, where an iſſue is brought down to trial before them, tho they have no power originally to hold plea in a *quare impedit.*

And that this was the meaning of the ſtatute of 14 *H.* 6. *cap.* 1. and tho it ſpeaks of all caſes of felony and of treaſon, yet it is intended only of ſuch felonies or treaſons as were at iſſue and brought down before them to be tried by *niſi prius*, appears in this, that as to thoſe points of treaſon, which were enacted by 3 *H.* 5. *cap.* 7. it is expreſly enacted by that ſtatute, that they ſhall have commiſſions to hear and determine them, and ſo as to thoſe they needed not the aid of a new ſtatute to enable it.

Now as to the uſage thereupon.

1. In caſe of appeals. If iſſue be joined and ſent down by *niſi prius* to be tried, antiently indeed they did not proceed to judgment; but if the defendant, were acquitted, they did by the ſame jury inquire, 1. Of the damages. 2. Of the ſufficiency of the plaintiff. 3. Of the abetters; and this inqueſt being returned into the king's bench, there judgment and execution were made, *quod vide* 8 *H.* 5. 6. *Coron.* 463. yea and by *Fairfax*, 22 *E.* 4. 19. If the plaintiff were nonſuit at the *niſi prius*, the juſtices of *niſi prius* ſhould only record it, and remit the record into the king's bench, and not arraign the priſoner at the king's ſuit. [41]

But the later practice and authority is otherwiſe, *viz.* That they may not only inquire of the abetters, but alſo give judgment againſt them; and, if the plaintiff be nonſuit, may arraign the priſoner at the king's ſuit, and give judgment and make execution. *Dy.* 120. *a. Read*'s caſe. And ſo if he be convict of manſlaughter upon an appeal: the juſtices of *niſi prius* allow his clergy, 4 *Co. Rep.* 43. *b. Bi-*

(a) cap. 30. See 2 *Co. Inſtit.* 424.

Lith's caſe; and this it ſeems is warranted by the conſtruction of the ſtatute of 14 *H.* 6. *cap.* 1. for the ſtatute of *Weſtm.* 2. *cap.* 12. *(b)* extends not to this caſe, eſpecially of arraigning the priſoner upon a nonſuit.

2. As to an indictment of felony or treaſon removed out of the county by *certiorari*, and the party pleading, the record is ſent down by *niſi prius* to be tried, the judges of *niſi prius* may upon that record proceed to trial, and judgment, and execution, as if they were juſtices of gaol-delivery by virtue of the ſtatute of 14 *H.* 6. *cap.* 1.

But if there were any queſtion upon that ſtatute, yet the ſtatute of 6 *H.* 8. *cap.* 6. which extends to all juſtices and commiſſioners as well as thoſe of gaol-delivery and of the peace, enables the court of king's bench to ſend to them the very record itſelf, and by ſpecial writ or mandate to command them to proceed to trial and judgment upon ſuch iſſue joined; as they may command the juſtices, before whom the indictment was taken, to proceed to hear and determine the ſame if no ſuch iſſue were joined.

4 Blacks. Com. ch. 19. p. 269. See Index to 2 Hawk. P. C. Titles Aſſiſe, Niſi prius.

(b) 2 *Co. Inſtit.* 383.

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[42] CHAP. VII.

Concerning the commiſſion of peace, *and the power thereof, in relation to felonies.*

AT common law there were conſervators of the peace aſſigned by the king by commiſſion.

But the firſt eſtabliſhment of juſtices of the peace was by the ſtatute of 1 *E.* 3. *cap.* 16. *Good and lawful men ſhall be aſſigned in every county to keep the peace.*

And by the ſtatute of 18 *E.* 3. *cap.* 2. *Two or three of the beſt reputation in the counties, with other wiſe and learned in the law, ſhall be aſſigned by the king's commiſſion to hear and determine felonies and treſpaſſes done againſt the peace in the ſame counties, and inflict puniſhment reaſonably according to law and reaſon, and the manner of the deed*; and this ſtatute directed their power of hearing and determining as well as keeping the peace.

In

In purſuance of theſe ſtatutes, and of other ſtatutes *(a)* relative to juſtices of peace, they have a commiſſion of the peace under the great ſeal directed to them.

And this commiſſion conſiſted antiently of three clauſes of *Aſſignavimus*, and now of two.

The firſt is, *Aſſignavimus vos conjunctim & diviſim & quemlibet veſtrûm ad pacem noſtram in com'* Cant' *conſervandam, &c.* And this makes every of them conſervators and juſtices of the peace for thoſe acts that are performable by one juſtice.

The ſecond is, *Aſſignavimus vos & quoſlibet duos vel plures veſtrûm, quorum aliquem veſtrûm* A. B. C. *&c. unum eſſe volumus, juſticiarios noſtros ad inquirendum per ſacramentum proborum & legalium hominum de comitatu prædicto, per quos rei veritas melius ſciri poterit, de omnibus & omnimodis feloniis, veneficiis, incantationibus, arte magicâ, fortilegiis, tranſgreſſionibus, foreſtallariis, regratariis, ingroſſariis, extortionibus quibuſcunque: Ac de omnibus & ſingulis aliis malefactis & offenſis, de quibus juſticiarii pacis noſtræ legitimè inquirere poſſunt aut debent, per quoſcunque & qualitercunque in comitatu prædicto factis & perpetratis, vel quæ in poſterûm ibidem fieri contigerit*; and then goes to ſome particular offenſes, and to inſpect indictments taken before them or before former juſtices of the peace, and to make proceſs againſt perſons indicted, *quouſque capiantur, reddant ſe, vel utlagentur: Ac omnia & ſingula felonias &c. & cætera præmiſſa ſecundûm legem & conſuetudinem regni noſtri* Angliæ *audiendum & terminandum*, and to do execution thereupon. [43]

A proviſo if a caſe of difficulty ariſe, then to reſpite judgment till the juſtices of aſſiſe come into the county, *&c.*

So that the commiſſion gives a perſonal power to every juſtice of peace by the firſt clauſe; but by the ſecond gives to them, or two of them, whereof one of the *quorum*, power to hear and determine felonies, *&c.*

But beſides theſe powers ſpecially given them by their commiſſion, and the general acts of parliament touching juſtices of peace, there are divers ſubſequent ſtatutes, that give them powers, ſometimes to one juſtice, ſometimes to two, ſometimes in their ſeſſions, ſometimes out of their ſeſſions, which it were too long here to recite; I ſhall only apply myſelf to that power, that they have by their com-

(a) 34 *E.* 3. *cap.* 1. 2 *H.* 5. *cap.* 1.

miſſion or otherwiſe, in relation to treaſons, felonies, and capital offenſes.

I. And in the firſt place touching the ſecond *Aſſignavimus*, whereby they have power to hear and determine.

Without this clauſe they have no power to hear and determine felonies or other matters, for the bare making of them juſtices of peace without this clauſe doth not give them power to hear and determine indictments: *vide Stamf. P. C. Lib.* II. *cap.* 5. *f.* 58. *a.* And therefore in all returns of making up of records before juſtices of peace touching indictments or convictions, they muſt be mentiond to

[44] be juſtices of peace, *nec non ad diverſa felonias, tranſgreſſiones, & alia malefacta in eodem comitatu perpetrata audiendum & terminandum aſſignat'*.

Yet this clauſe doth not make them juſtices of *oyer* and *terminer*, for *that* is a diſtinct commiſſion of another nature, as hath been ſhewn; and therefore thoſe acts of parliament, that create new offenſes and limit them to be heard and determind before juſtices of *oyer* and *terminer* only, give not thereby power to the juſtices of peace in ſuch caſes, unleſs alſo named in the act of parliament.

As the ſtatute of 5 *Eliz. cap.* 14. of forgery, 3 *H.* 7. *cap.* 13. conſpiring the king's death, 33 *H.* 8. *cap.* 12. murder in the king's palace, 8 *H.* 6. *cap.* 12. embezzeling records, 33 *H.* 6. *cap.* 1. embezzeling maſter's goods, 2 & 3 *E.* 6. *cap.* 24. ſtroke in one county and death in another, acceſſary in one county to a felony in another; for theſe ſtatutes limit the puniſhment of theſe offenſes to ſpecial judges appointed by the acts themſelves, or to juſtices of *oyer* and *terminer*, under which appellation generally, in ſtatutes, juſtices of peace come not. 9 *Co. Rep.* 118. *b. Co. P. C. cap.* 41. *p.* 103. *Dalt. cap.* 20. *(b)*.

As touching high treaſon it is not mentiond in their commiſſion, and they have no power to hear and determine it by the general words of their commiſſion.

But a juſtice of peace upon complaint of a treaſon, may examine and commit the offender to priſon, and take informations touching it, for it is a breach of the peace, and in order to the conſervation thereof, he may commit the offender to gaol, in order to farther proceeding againſt him by juſtices of *oyer* and *terminer* or gaol-delivery.

(b) New Edit. cap. 40. *p.* 108.

But

But by ſome acts of parliament juſtices of peace may take indictments of particular treaſons, but thoſe preſentments they muſt certify into the king's bench or gaol-delivery, as the caſe ſhall require, as upon the ſtatute of 5 *Eliz. cap.* 1. for maintaining the authority of the ſee of *Rome*, 13 *Eliz. cap.* 2. for bringing *in* bulls for abſolution, *Agnus Dei*, *&c.* 23 *Eliz. cap.* 1. for withdrawing and reconciling, or being withdrawn from the king's alligeance.

By the ſtatute of 3 *H.* 5. *cap.* 7. as to treaſon for clipping, *&c.* power was given to the juſtices of peace to inquire [45] and make proceſs thereupon, and antiently that clauſe was put into their commiſſion, but now omitted; for by the ſtatute of 1 *Mar. cap.* 1. the act of 3 *H.* 5. *cap.* 6. is repealed, and conſequently the act of 3 *H.* 5. *cap.* 7. that gave power to juſtices of peace to inquire touching it.

By the ſtatute of 26 *H.* 8. *cap.* 6. power is given to juſtices of peace to the adjacent counties to hear and determine counterfeiting and clipping of coin, and murders and other felonies in *Wales*; but this alſo as to treaſons is repeald by the ſtatute of 1 *&* 2 *P. & M. cap.* 10.

As touching felonies.

It is true, that by the antient ſtatute of 6 *E.* 1. *cap.* 9. and 4 *E.* 3. *cap.* 2. murders and manſlaughters were to ſtay till the gaol-delivery.

But by the ſtatutes of 18 *E.* 3. *cap.* 2. 34 *E.* 3. *cap.* 1. 17 *R.* 2. *cap.* 10. tho they do only mention felonies, and do not expreſly mention murders and manſlaughters, and although the commiſſion of the peace mentions not murders by expreſs name but only felonies generally, yet by theſe general words in theſe ſtatutes, and this commiſſion, they have power to hear and determine murders or manſlaughters, and thus it has been reſolved 5 *E.* 6. *Dy.* 69. *a. Pref.* to 10 *Co. Rep.* againſt the opinion of *Fitzherbert* in his Juſtice of Peace, and 9 *H.* 4. 24. *Coron.* 457.

For till the ſtatute of 13 *R.* 2. *cap.* 1. a general pardon of all felonies had pardoned murder; and tho that ſtatute require the word *murder* to be expreſſed, yet that is with relation only to pardons, and not to reſtrain the extent of the word *felonies* in a commiſſion.

And therefore I know not what my lord *Coke* means in his comment upon the ſtatute of *Glouceſt. cap.* 9. 2 *Inſtit. p.* 316. where he ſaith, *that juſtices of peace cannot take an indictment of the killing of a*

man ſe defendendo, *becauſe not within their commiſſion, but juſtices of gaol-delivery may*; for if juſtices of peace have a power to hear and determine murder or manſlaughter, it ſeems they may take an indict-
[46] ment of *ſe defendendo*, for the coroner may take an indict-ment of *ſe defendendo*. 3 *E.* 3. *Coron.* 286. *Co. Entries* 354. *a. Crompt. Juſtice* 28. *a. Holme*'s caſe, and ſo may juſtices of peace againſt the opinion of *Stamford*, *f.* 15. *b.* But tho the juſtices have this power, yet they do not ordinarily proceed to the hearing and determining of murder or manſlaughter, and rarely of other offenſes without clergy, and the reaſons are,

1. The monition and clauſe in their commiſſion *in caſes of difficulty to expect the preſence of the juſtices of aſſiſe.*

2. The direction of the ſtatute of 1 & 2 *P.* & *M. cap.* 13. which directs juſtices of peace in caſe of manſlaughter and other felonies to take the examination of the priſoner and the information of the fact, and put the ſame in writing; and then to bail the priſoner, if there be cauſe, and to certify the ſame with the bail at the next gaol-delivery; and therefore in caſes of great moment they bind over the proſecutors, and bail the party, if bailable, to the next gaol-delivery; but in ſmaller matters, as petit larciny and ſome caſes within clergy, they bind over to the ſeſſions, *vide Dalt. cap.* 20. *(c)*; but this is but in point of diſcretion and convenience, not becauſe they have not juriſdiction of the crime.

By force of this commiſſion they may take an inquiſition touching *felo de ſe*, if not inquired before by the coroners; and tho the coroner's inquiſition is to be *ſuper viſum corporis*, this needs not, but it is traverſable. *Co. P. C. p.* 55.

They may proceed upon an indictment taken before former juſtices of the peace in the county by the ſtatute of 11 *H.* 6. *cap.* 6. and 1 *E.* 6. *cap.* 7. but cannot proceed upon an indictment taken before commiſſioners of *oyer* and *terminer* or gaol-delivery. *Lamb. Juſtic. p.* 551.

But if an indictment be taken before the ſheriff in his *Turn* by the ſtatute of 1 *E.* 4. *cap.* 2. thoſe indictments are to be delivered to the juſtices of peace at their next ſeſſion, and they may proceed upon thoſe preſentments.

Tho they have power to hear and determine felonies, yet, 1. They cannot deliver a perſon by proclamation, (as juſtices of gaol-delivery

(c) New Edit. p. 107.

may,)

may,) till an inquiſition taken; but if an inquiſition be taken and an *ignoramus* found, they may deliver him, as it ſeemeth, *Crompt. de Pace, f.* 9. *b.* 2. They cannot aſſign a coroner to an approver.

Tho this be not a commiſſion of *oyer* and *terminer*, yet by the opinion *B. Commiſſion* 8. a commiſſion of *oyer* and *terminer* in the county determines the ſecond *Aſſignavimus* of the commiſſion of the peace *ad audiendum & terminandum*; *quod quære.*

A general commiſſion of the peace in a county, in two caſes, doth not determine the power of former juſtices of peace. 1. Where they are juſtices by charter, ſuch as are in *London, Norwich, &c.* for theſe are perpetual and not amoveable. 2. Juſtices in a particular city or corporation, parcel of a county, by commiſſion are not ſuperſeded by a new commiſſion granted for the whole county by the ſtatute of 2 & 3 *P. & M. cap.* 18. *Vide ſtatute* 11 *H.* 6. *cap.* 6.

If the king by charter grant to a corporation, that the mayor and recorder ſhall be juſtices of peace within the city, whereby they are juſtices in perpetuity by charter, yet if there be no words of excluſion, the juſtices of peace of the county have a concurrent juriſdiction with the juſtices by charter, and ſo it is, if they be juſtices by commiſſion in the town or city: Or the king, notwithſtanding that charter, may grant a commiſſion of the peace ſpecially in that city or county, and they will have a concurrent juriſdiction with the juſtices by charter.

But if this franchiſe of being juſtices be granted, *ita quòd juſticiarii comitatûs ſe non intromittant*, then, tho a ſubſequent commiſſion be granted in the county at large, it ſeems they have no juriſdiction in this corporation or town. 20 *H.* 7, 8. *Caſe de Abbè de St. Albans*; *quære tamen*, whether the indictment or ſeſſion in the franchiſe be void or only a contempt in the juſtices: This was heretofore moved between the juſtices of the peace of *Surrey* and the borough of *Southwark*, but never reſolved; but ſome thought it to be like the caſe of the bailiwick of a liberty and *retorna brevium* granted, *ita quòd vicecomes non intret*, if the ſheriff executes a writ within the liberty, the execution is good, but the ſheriff puniſhable for infringing the franchiſe. [48]

By the ſtatute of 4 *E.* 3. *cap.* 2. the juſtices of the peace ought to deliver all their preſentments to the next ſeſſion of gaol-delivery, where they ſhall be finally heard and determined.

It

It is true the juſtices of peace may ſo deliver them over, and if they deliver them ſo over, the juſtices of gaol-delivery may proceed to determine them, as well as upon the coroner's inqueſt, namely if the offender be in gaol, but otherwiſe not.

But this delivery over of the preſentments at the ſeſſion is neither uſual nor neceſſary at this day, for that ſtatute was made when the juſtices of peace had only power to inquire and not to determine.

But by the ſtatute of 18 *E.* 3. *cap.* 2. their commiſſions where to hear and determine, and ſo were all the comiſſions of the peace made after that ſtatute, ſo that after that ſtatute they might, if they pleaſed, determine the preſentments taken before themſelves.

Tho commiſſioners of *oyer* and *terminer* may indict and try at the ſame ſeſſion, yet (as before) it hath been ruled otherwiſe in caſe of juſtices of peace, unleſs by conſent. But certainly conſtant uſage and learned opinion muſt give that expoſition upon thoſe reſolutions, that it muſt extend only to popular actions or indictments for miſdemeanors, and not in caſes of felony, for here they may and do proceed *de die in diem* and at the ſame ſeſſions, and ſo much is intimated in *Bumpſted's* caſe, *H.* 11 *Car.* 1. *(d) ſupra, cap.* 4. *p.* 28. and *Coke* 4 *Inſtit. cap.* 28. *p.* 164. expreſly ſaith it is common experience, and reaſon ſpeaks for it, as well as in the caſe of the commiſſion of *oyer* and *terminer*, the ſeſſion being in the ſame county, and with a public ſummons preceding every general ſeſſions.

The ordinary courſe of proceeding is in their ſeſſions, which are of two kinds, *viz.* private ſeſſions, or public. Touching the former I ſhall ſay nothing, for it is ordinarily for the diſpatch of country buſineſs, or about ale-houſes, poor, *&c.*

[49] The public ſeſſions are of two kinds, *viz.* the general quarter-ſeſſions, and general ſeſſions that are not quarter-ſeſſions; both are or ſhould be ſummoned by a precept in the king's name; *quod vide Crompt. Juſtice* 232. *a.* or of the Juſtices. *Lamb. Lib.* IV. *cap.* 2.

As to the juriſdiction in general both agree, that in either of theſe general ſeſſions of the peace they may proceed touching thoſe matters that are within their commiſſion, as to take indictments, try felons, *&c.*

But by particular acts of parliament ſome things are limited to the quarter-ſeſſions, and cannot be proceeded in at other general ſeſſions,

(d) *Cro. Car.* 438. 448.

as

as 5 & 6 *E.* 6. *cap.* 14. for ingroſſing, 1 *H.* 7. *cap.* 7. hunting, 2 & 3 *P.* & *M. cap.* 8. highways, 5 *Eliz. cap.* 9. perjury, 5 *Eliz. cap.* 12. licenſing badgers, 7 *E.* 6. *cap.* 5. wines, and divers others, *de quibus vide Lamb. Lib.* IV. *cap.* 19.

Theſe quarter-ſeſſions were by ſeveral acts of parliament appointed to be held at ſeveral times, by 25 *E.* 3. *cap.* 8. at the *Annunciation, St. Margaret, St. Michael,* and *St. Nicholas.*

By 36 *E.* 3. *cap.* 12. within the *utas* of *Epiphany,* within the week of *Lent,* between *Penteceſt* and *Midſummer,* within eight days of *St. Michael.*

By 12 *R.* 2. *cap.* 10. the ſeſſions are ſet at liberty, *viz.* to be held every quarter of the year at leaſt; only *Middleſex* is excepted by 14 *H.* 6. *cap.* 4.

By the ſtatute of 2 *H.* 5. *cap.* 4. in the firſt week after *St. Michael, Epiphany,* clauſe of *Eaſter,* and tranſlation of *St. Thomas* the martyr.

By the ſtatute of 33 *H.* 8. *cap.* 10. the *Tueſday* after *Eaſter* week is expounded to be in the week after *Clauſum Paſchæ,* for the ſeſſions to be held; yet *Clauſum Paſchæ* or *Low-Sunday* is the firſt day of that week.

The ſtrict regular expoſition of the ſtatute of 2 *H.* 5. for the week after *Michaelmas, &c.* is, that if *Michaelmas* fall upon the *Sunday* or *Monday,* the quarter-ſeſſions in ſtrictneſs ſhould be held in the enſuing week, and not the ſame week.

Yet it is very plain, that the quarter-ſeſſions are variouſly held in ſeveral counties, ſome at one day, ſome at another, [50] yet it hath been ruled, that theſe are each of them good quarter-ſeſſions within the ſeveral acts that relate to quarter-ſeſſions; for theſe acts, eſpecially that of 2 *H.* 5. is only directive and in the affirmative, and therefore, tho the ſeſſions are held at another day according to the general direction of the ſtatute of 12 *R.* 2. yet they are quarter-ſeſſions.

Nay in *Middleſex,* where by the ſtatute of 14 *H.* 6. there are regularly but two ſeſſions, yet they may hold quarter-ſeſſions (as indeed they do,) in that county: tho theſe ſeſſions are not preciſely held at the times prefixed by 2 *H.* 5. yet they are quarter-ſeſſions if held quarterly; and ſo it was agreed by the juſtices upon a late act *(e)* this ſeſſion of parliament for the taking and ſubſcribing the oaths of ſupremacy.

(e) 25 *Car.* 2. *cap.* 2.

II. I ſhall now proceed to ſome few obſervations touching the power of particular juſtices of peace by virtue of their firſt *Aſſignavimus* in the commiſſion, which makes every particular juſtice a juſtice of peace, and gives him power to conſerve the peace.

Concerning their power to bail or commit perſons brought before them for felony *vide infra in capite de bail & mainpriſe (f)*, *& nota ſtatute.* 34 *E.* 3. *cap.* 1. *& alia ſtatuta.*

They are to execute their authority as juſtices of peace within the county wherein they are juſtices.

If a juſtice of peace lives or be out of the county, wherein he is juſtice, he cannot by his warrant fetch a perſon out of the county, where he is juſtice, to come before him in the county, where he is; 13 *E.* 4. 8. *b. Plowd. Com.* 37. *a. Platt's* caſe.

He cannot do a judicial act out of the county wherein he is a juſtice of peace, as take recognizances, take examinations, commit offenders, *&c.* but he may do a miniſterial act, as to examine a party robbed,
[51] whether he knows the felons according to the ſtatute of 27 *Eliz. cap.* 13. *H.* 6. *Car.* 1. *B. R. Helier's* caſe, *Croke*, *p.* 211, 212. yet *quære* of recognizances and examinations, for they are acts of voluntary juriſdiction, and therefore it ſeems may be done out of the county, as well as a biſhop may grant adminiſtration, inſtitution, or orders out of his dioceſe: But indeed impriſoning of a perſon for not giving recognizance, or committing a perſon for a crime, are acts of compulſory juriſdiction, and may not be exerciſed out of his county *(g)*.

Yet ſuppoſe a man be a juſtice of peace in *London* and in *Middleſex*, as the recorder is, whether he may not commit a perſon in *Middleſex* brought out of *London* or *è converſo*, it ſeems it hath been always practiſed, for he is in commiſſion in both places.

If *A.* commits a felony in the county of *B.* where he lives, and goes into the county of *C.* and is there taken, a juſtice of the peace

(f) cap. 15.

(g) By 9 *Geo.* 1. *cap.* 7. §. 3. "If a "juſtice happens to dwell in any city or "other precinct, that is a county of itſelf, "ſituate within the county at large, for "which he ſhall be appointed a juſtice, "tho not within the ſaid county, he may "grant warrants, take examinations, and "make orders for any matters, which "any one juſtice may act in at his dwell- "houſe, tho out of the county whereof "he is appointed a juſtice, and in ſome "city or precinct adjoining, that is "a county of itſelf; provided, that no "power is thereby given to the juſtices "for the county at large to hold their "ſeſſions in cities or towns, that are "counties of themſelves, nor to juſtices, "ſheriffs, conſtables, or other peace-offi- "cers of the county at large to act or "intermeddle in any matters ariſing with- "in ſuch cities or towns, otherwiſe than "as if the ſaid act had never been made."

of

of the county of *C.* may take his examination and informations in the county of *C.* tho the felony were committed in the county of *B.* yet *quære*, whether upon his arraignment in the county of *B.* thoſe examinations can be given in evidence; I have not allowd them, becauſe tho he may commit and examine, and give an oath to the informers, yea and bind them over to give evidence or commit them, yet that is but for neceſſity of preſerving the peace, for he hath really no juriſdiction in the caſe.

And *note*, the cuſtom of *London* enables the juſtices of gaol-delivery to ſit at *Newgate*, which is in *London*, both for *Middleſex* and *London*, But the juſtices of the peace for *Middleſex* ſit only in *Middleſex*, and the juſtices of the peace for *London* in *London*.

By the ſtatute of 1 & 2 *Ph. & Mar. cap.* 13. they ought to take the examinations of felons (without oath,) and the [52] informations of accuſers or witneſſes (upon oath,) and return them to the juſtices of gaol-delivery.

And theſe examinations may be read as evidence againſt the priſoner, and ſo may the informations of witneſſes taken upon oath, if they are dead or not able to travel, for they are judges of record, and the ſtatute enables and requires them to take theſe examinations; but then oath is to be made in court by the juſtice or his clerk, that theſe examinations and informations were truly taken.

If *A.* brings *B.* before a juſtice of peace for ſuſpicion of felony, if he can teſtify materially againſt him, he may bind him over to proſecute; and, if he refuſes, the juſtice may commit him.

The juſtices of the peace have juriſdiction of felonies ariſing within the vergē. 4 *Co. Rep.* 46. *a. Wigg*'s caſe.

The juſtices of the peace in their ſeſſions may proceed to outlawry in caſes of indictment found before them, and that by the common law; and in caſes of popular actions may proceed to outlawry by the ſtatute of 21 *Jac. cap.* 4.

But they cannot iſſue a *capias utlegatum*, but muſt return the record of the outlawry into the king's bench, and there proceſs of *capias utlegatum* ſhall iſſue. *Dalt. p.* 406. *(h)*.

See Burn. Tit. Juſtices of Peace. 1 Blackſ. Com. ch. 9. p. 351, &c. and Index to 2 Hawk. P. C. Tit. Peace.

(h) New Edit. p. 672.

CHAP.

CHAP. VIII.

Concerning the coroner and his court, *and his authority in pleas of the crown.*

CORONERS are of three kinds, *viz.* 1. *Virtute officii.* 2. *Virtute cartæ ſive commiſſionis.* 3. *Virtute electionis*, as the coroners of counties.

I. The coroner *virtute officii* is the chief juſtice of the king's bench, who by virtue of his office is the chief coroner of *England*, 4 *Co. Rep.* 57. *b. in caſe de comminaltie de Sadlers*, and therefore it is there ſaid, "That in the time of *H.* 7. it was reſolved, if a man be ſlain in open "rebellion, the chief juſtice upon the view of his body may make a "record thereof and ſend it into the king's bench, and thereupon the "party ſlain ſhall forfeit his lands and goods," which may be true as to goods, but not as to lands, becauſe none can be attainted after his death but by act of parliament.

But of this hereafter.

II. Coroners by charter or commiſſion or privilege: And theſe ordinarily were made by grant or commiſſion without election; ſuch are the coroners of particular lords of liberties and franchiſes, who by charter have power to create their own coroners, or to be coroners themſelves: Thus the mayor of *London* is by charter coroner of *London*, the biſhop of *Ely* hath power to make coroners in the iſle of *Ely* by the charter of *H.* 7. Queen *Catharine* had the hundred of *Colridge* granted to her by the king 35 *H.* 8. with power to nominate coroners. 9 *Co. Rep.* 29. *b. Ameredith*'s caſe.

And therefore by the ſtatute of 28 *E.* 3. *cap.* 6. where the power of electing coroners is confirmed to the counties, yet there is a ſaving to the king and other lords, which ought to make ſuch coroners, their
[54] feignories and franchiſes, ſo that the king may grant coroners within certain precincts; and lords of franchiſes, that have power to nominate coroners by charter, may ſtill do it without election.

There have been two great precincts, that by the king's grants have power of granting or having coroners, namely, the juriſdiction of the admiralty, and the verge.

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As touching the former I have not ſeen the grant, but I have heard the lord admiral is either made coroner, or hath power to make them within his juriſdiction; and of the death of a man or other articles belonging to the coroner ariſing upon the high ſea, inquiſitions have been uſually taken by the coroners appointed by the king or his admiral, and here the coroners of the county have no juriſdiction.

But of deaths of men happening upon arms of the ſea below the bridges within the bodies of counties, as upon *Thames* or *Severn*, *&c.* in ſhips there hovering, tho the coroner of the admiralty hath juriſdiction, yet it is not excluſive of the juriſdiction of the coroner of the county, who may inquire in any great river upon theſe articles, where a man can ſee from one ſide to the other, 8 *E.* 2 *Coron.* 399. Only the inquiſitions taken before the coroner of the admiral are returned before the commiſſioners upon the ſtatute 28 *H.* 8. *cap.* 15. The inquiſition before the coroner of the county is to be returned before the commiſſioners of gaol-delivery for the county.

The other great juriſdiction is the coroner of the king's houſe, uſually called the coroner of the verge, who it ſeems antiently was appointed by the king's letters patent; but by the ſtatute of 33 *H.* 8. *cap.* 12. the granting thereof is ſettled in perpetuity in the lord ſteward, or lord great maſter of the king's houſe for the time being.

Antiently the coroner of the verge had power to do all things within the verge belonging to the office of the coroner, excluſive of the coroner of the county; but becauſe the king's court was moveable often, by the ſtatute of *Articuli ſuper cartas*, *cap.* 3. *(a)*, it is ordained, that of the death of a man the coroner of the county ſhall join in inquiſition to be taken thereof with the coroner of the king's houſe; and if it happen it cannot be determined before the ſteward, [55] proceſs and proceeding ſhall be thereupon had at common law.

But yet in that caſe of death within the verge, the coroner of the county cannot take an inquiſition without the coroner of the verge; and if he doth, it is void; but if one perſon be coroner of the county and alſo of the verge, the inquiſition before him is as good as if the offices had been in ſeveral perſons, and taken by both.

And tho the court remove, yet he may proceed upon that inquiſition, as coroner of the county. 4 *Co. Rep.* 45 *&* 46 *Wigg*'s caſe.

But if a murder or manſlaughter be done within the precincts of the king's palace limited by the ſtatute of 33 *H.* 8. *cap.* 12, then by that

(a) 2 *Co. Inſtit. p.* 550.

ſtatute

ſtatute the inquiſition ſhall be taken by the coroner of the houſhold, without the adjoining or aſſiſting of any coroner of any county, by twelve or more of the yeomen officers of the king's houſhold; and this is enacted to be as ſufficient, as if taken alſo by the coroner of the county, and the method of the return and proceeding upon thoſe inquiſitions before the lord ſteward is therein declared and enacted.

III. The general coroners of counties.

Theſe by the ſtatute of *Weſt.* 1. *cap.* 10. *(b)*, and 28 *E.* 3. *cap.* 6. are eligible by the county in the county-court by the king's writ *de coronatore eligendo*, and ſworn by the ſheriff for the due execution of their office. *F. N. B.* 163.

The ſtatute of *Weſtm.* 1. directs they ſhould be knights, but that is out of uſe; but by the ſtatute of 14 *E.* 3. *cap.* 8. they ought to have ſufficient lands in the county; and by the ſtatute 28 *E.* 3. *cap.* 6 they ought to be lawful and fit men.

In as much as their office is by election, their offices do not determine by the demiſe of the king, as ſheriffs do. *Dy.* 165. *a.* (*)

And in as much as they are elected by the freeholders of the county, if they be inſufficient and not able to anſwer their fines, and perform the duties of their place, the whole county ſhall be anſwerable for them and their miſcarriages, and amercements or fines ſhall be impoſed upon them for the ſame, *(viz.* if upon proceſs againſt the coroner for his fine or amercement the ſheriff return *nihil habet,)* and proceſs ſhall go againſt the whole county, becauſe elected by them. 2 *Co. Inſtit. p.* 175.

[56]

In ſome counties there be only two coroners, in ſome four, in ſome ſix, and by the ſtatute of 34 & 35 *H.* 8. *cap.* 26. in each county in *Wales*, and in *Cheſter* two.

If there be above two coroners in a county, and a writ be directed *coronatoribus*, tho one die, yet as long as the plural number remain, a return by the coroners is good; but if there be but only one ſurvivor, he cannot execute the writ and return it till another be made. 14 *H.* 4. 35. *a.* 31 *Aſſiz.* 20. But if there be two coroners, in a county or more, one may execute the writ, as in caſe of an *exigent*, but the return muſt be in the name of the *coronatores.* 14 *H.* 4. 34. *b. per Hank.* 39 *H.* 6. 41.

But tho there be many coroners in the county, an inquiſition *ſuper viſum corporis* may be taken by any one of them. *Stamf. P. C. p.* 53. *a.*

(b) 2 *Co. Inſtit. p.* 174.

(*) See 4. *E.* 4. 43. *a. in notis ad p.* 101.

As

As coroners may be elected by writ *de coronatore eligendo*, ſo they may be amoved for reaſonable cauſe, and new ones choſen in their room by writ.

And altho that cauſe be not traverſable, 5 *Co. Rep.* 58. *b.* yet if it be falſe, he may have a *ſuperſedeas* to that new writ. *F. N. B. p.* 163.

Thus far concerning the conſtitution of theſe officers and their different kinds; now touching their juriſdiction and proceeding.

Before the ſtatute of *Magna Carta*, *cap.* 17. *(c)* the coroner held pleas of the crown, by that ſtatute *nullus vice-comes, conſtabularius, coronator vel alii ballivi noſtri teneant placita coronæ*, ſo that thereby their power in proceeding to trial or judgment in pleas of the crown is taken away.

But yet they retaind a juriſdiction ſtill as to matters of inquiry, taking of appeals, *&c.* all which is ſet down at large [57] in the ſtatute of 4 *E.* 1. ſtyled *De officio coronatorum, viz.* 1. Of the death of a man, whether by felony, misfortune, *&c. viz. de ſubitò mortuis.* 2. Of *treaſure-trove.* 3. Of appeals of rape. 4. Appeals *de plagis & mahemio.* 5. Of deodands. 6. Of wreck of the ſea; and 7. By ſome, of breach of priſon *(d)*. I ſhall reduce them to theſe four, *viz.*

1. His power to take inquiſitions *ſuper viſum corporis.* 2. His power to take appeals. 3. His power to take the accuſation of an approver. 4. His power to take abjuration.

I. For inquiſitions.

Regularly the coroner hath no power to take inquiſitions, but touching the death of a man and perſons *ſubitò mortuis*, and ſome ſpecial incidents thereunto.

If any perſon dies ſuddenly, tho it be of a fever, and the townſhip bury him before the coroner be ſent for, the whole townſhip ſhall be amerced. *Itin. North. Coron.* 319. *Nota*, this caſe is miſprinted, I have ſeen an antient tranſcript at large of the *Iter* of *North'ton*, and peruſed this very caſe, which *in libro meo f.* 52. *b.* is *moruſt de feyme, viz.* ſtarved by hunger; for tho a man dies ſuddenly of a fever or apoplexy, or other viſitation of God, the townſhip ſhall not be amerced, for then the coroner ſhould be ſent for in every caſe; but if it be an unnatural or violent death, then indeed if the coroner be not ſent for to view the body, the town ſhall be amerced.

(c) 2 *Co. Inſtit. p.* 32. *(d) Vide Coron. p.* 435.

And ſo it is if the vill leaves a body, that died of a violent death, above ground unburied, the townſhip ſhall be amerced, 3 *E.* 3. *Coron.* 339. and the amercements in theſe caſes may be ſet upon the preſentment of the grand inqueſt, or upon the preſentment of the coroner.

But if a priſoner *in gaol* dies a natural death, yet regularly the gaoler ought to ſend for the coroner to inquire, becauſe it may be poſſibly preſumed, that the priſoner died by the ill uſage of the gaoler.

[58] And if this death happens in the king's bench, the clerk of the crown, who is the coroner for that court, is to view the body. 3 *E.* 3. *Coron.* 292. 8 *E.* 2. *Coron.* 421.

If the coroner have notice and comes not in convenient time to view the body and take his inquiſition upon the death of him, that thus dies ſuddenly, and therefore upon a preſentment by the grand inqueſt of a death by miſadventure, if the like preſentment be not found in the coroner's roll, he ſhall be fined and impriſoned. 3 *E.* 3. *Coron.* 292.

And by the ſtatute of 1 *H.* 8. *cap.* 7. he ſhall forfeit forty ſhillings for every ſuch default, and the juſtices of the peace and juſtices of aſſiſe have power to enquire of thoſe defaults, and this without any fee to be taken by the coroner. But by the ſtatute of 3 *H.* 7. *cap.* 1. if the coroner be remiſs, and makes not inquiſitions upon perſons ſlain, or doth not return the ſame to the next gaol-delivery, he is to forfeit 5l. for every default.

The coroner cannot take an inquiſition but upon the view of the body, and if he doth, ſuch inquiſition is void; and the reaſon is, becauſe oftentimes much of the evidence ariſeth upon the view, for the inquiſition ought to contain the manner of his death, the place, length and depth of the wound, *&c.*

And therefore tho where there are many coroners, one may take the inquiſition. *Stamf.* 53. *a*, yet it cannot be done by deputy, for by the ſtatute of *Exon* 14 *E.* 1. the coroner is to view the body and take the inquiſition in his own perſon. *Crompt. Juſtice, f.* 227. *a.*

And therefore if the body be buried before the coroner comes, tho the coroner ought to record it, and the townſhip ſhall be thereupon amerced, as before is ſaid, yet the coroner ought to take up the body, and take his view thereof, if there be any poſſibility of it, and therefore the body hath in ſuch caſe been taken up fourteen days after,

and

and an inquiſition thereupon taken. 2 *R.* 3. 2. *a.* 21 *E.* 4. 70, 71. *Wingfield*'s caſe.

And therefore if the coroner take an inquiſition without view of the body, he may take a ſecond inquiſition *ſuper viſum corporis*, and that ſecond inquiſition is good for the firſt was abſolutely void. 2 *R.* 3. 2. 21 *E.* 4. 70. [59]

But if a coroner takes an inquiſition *ſuper viſum corporis*, and after this another coroner takes an inquiſition upon the ſame matter, the ſecond inquiſition is void, becauſe the firſt was well taken. *M.* 6 *R.* 2. *Coron.* 107. *Crompt. Juſtic.* 229. *b.*

If a coroner takes an inquiſition *ſuper viſum corporis* (as upon a *felo de ſe*), and that is ſent into the king's bench and quaſhed, the coroner may take a new inquiſition *ſuper viſum corporis*.

But upon a ſurmiſe, that the coroner ought to have found him *felo de ſe* and hath not, there ſhall be no *melius inquirendum* directed to the ſheriff; I have known it often denied, and it was held it was within the reſtraint of the ſtatute 28 *E.* 3. *cap.* 9.

But poſſibly a commiſſion or writ may iſſue for the inquiry of the goods of a felon not mentiond in the coroner's inquiſition.

If the coroner do not inquire of a *felo de ſe*, or of any other ſudden death, the juſtices of the peace or *oyer* and *terminer* may enquire thereof, and ſo may the juſtices of the king's bench, but then that preſentment is traverſable; but it is held that the preſentment of the coroner of a *felo de ſe* is not traverſable, *de quo ſupra*, *Part* I. *cap.* 31. *p.* 414. *Co. P. C. cap.* 8. *p.* 55.

When notice is given to the coroner of a miſadventure, he is to iſſue a precept to the conſtable of the four or ſix next townſhips to return a competent number of good and lawful men of their townſhips, *viz.* twelve at leaſt to make an inquiſition touching that matter. 4 *E.* 1. *Officium coronatoris.*

If they make not a return, or the jurors returned appear not, their defaults are to be returned by the coroner, and the conſtables or jurors in default ſhall be amerced before the juſtices in *eyre* antiently, but now before the juſtices of gaol-delivery.

But if the jurors appear, by *Crompt. Juſtice*, *f.* 226. *b.* they are not challengeable by either party.

Yet in *Mich.* 4 *Car. B. R.* Sir *William Withipole*'s caſe by the greater opinion of all the judges of *England* the ſtatute of 11 *H.* 2. *cap.* 9. extends to inquiſitions before the coroner, and [60]

that if in an inqueſt before the coroner one of the jurors be outlawed tho but of treſpaſs, this is a good plea to a coroner's inqueſt of murder *Cro. p.* 134.

The jury is to be ſworn and charged to inquire upon the view of the body how the party came by his death, whether by murder by any perſon, or by misfortune, or as *felo de ſe.*

In ſuch caſes, where the coroner's inqueſt is concluſive, (as it is commonly held in the caſe of *felo de ſe,*) the coroner muſt hear evidence as well againſt the king's intereſt as for it, and that upon oath, for there is no perſon to be condemned to death, but only the fact to be inquired into.

And ſo it was ruled in *Barclaie*'s caſe who drowned himſelf, and the coroner would not admit witneſſes to prove him to be *non compos mentis* at the time, but ſhut them out, and only took witneſſes for the king; and for this cauſe the coroner was reprehended by the court of king's bench, and the inquiſition ſet aſide and not ſuffered to be filed, and a new inquiſition taken, whereby it was found he was *non compos*, for in this caſe there was no perſon put to anſwer; *de hoc vide ſupra, Part* I. *p.* 415.

But it hath been held, that if a perſon be killed by another perſon, and it be certainly known that he killed him, the jury muſt hear evidence only for the king; and whether the killing were by malice or without malice, nay tho it were ſuch a killing as is juſtifiable, as an officer killing one that aſſaults him in doing his office, yet the inqueſt muſt find it murder, becauſe the party ſhall be put to anſwer, and upon not guilty pleaded the whole matter will come to be tried by the petit jury, where the evidence of both ſides may be openly heard in court, and ſuch direction given as the nature of the fact requires, *viz.* to be murder, manſlaughter, or *per infortunium*: and thus it hath been commonly practiſed of later years.

But it ſeemeth to me, that this is neither reaſonable nor agreeable to law or antient uſage, but is a novelty as to the caſe of the coroner's inqueſt, tho it may be and is reaſonable and fit in caſe of an indictment by the grand inqueſt of the county, for theſe reaſons: 1. Becauſe the coroner's inqueſt, is to inquire *truly* (e) *quomodo ad mortem devenit*, and is rather for information of the

[61]

(e) Why ſhould not this argument hold as well in the caſe of an indictment by the grand inqueſt, ſince they are likewiſe by their oath *to preſent the truth, the whole truth, and nothing but the truth? vide infra, p.* 157.

truth

truth of the fact as near as the jury can aſſert it, and not for an accuſation. 2. Becauſe tho the priſoner may be arraigned upon the coroner's inqueſt, if it find it murder or manſlaughter, yet neither the court nor the proſecutor is concluded by it, but a bill of murder may be preferred to the grand inqueſt; and upon that new preſentment the party may be arraigned and tried, tho the coroner's inqueſt ariſes only to manſlaughter, or it may be to *ſe defendendo* or chance-medley. 3. And accordingly the antient practice hath been, for the coroner's inqueſt to find the matter as they judge it was: *vide* 26 *Eliz. Crompt. Juſtice, f.* 28. *a. Holmes*'s caſe, *Coke's Entries* 353. *b.* and very often in the antient *Iters* of *E.* 2. and *E.* 3. *de quo ſupra.*

And therefore the difference of the penning of the act of 1 & 2 *P. & M. cap.* 13. touching the examinations taken by the juſtices of the peace and the coroner is obſervable: The juſtices of the peace are to put into writing the informations againſt the felon of the fact and circumſtances thereof, or *ſo much thereof as ſhall be material to prove the felony*; but the coroner is to put into writing *the effect of the evidence given to the jury before him being material*, without ſaying *ſo much as is material to prove the felony*, but the whole evidence given whether to prove or diſprove the felony; and all this evidence is to be upon oath before the coroner's inqueſt, whether it makes for or againſt the priſoner: but indeed when the priſoner is to be tried upon that indictment, or the indictment of the grand inqueſt, thoſe witneſſes, that acquit the priſoner, are not to be heard upon oath at his trial, unleſs the proſecutor deſires it *(f)*.

So that I do conceive the coroner's inqueſt ought in all caſes to hear the evidence upon oath, as well that which [62] maketh for, as that which maketh againſt the priſoner, and the whole evidence ought to be returned with the inquiſition.

Now ſudden violent deaths, which are all within the coroner's office to inquire, are of theſe kinds. 1. *Ex viſitatione Dei.* 3. *Per infortunium*, where no other had a hand in it, as if a man falls from a houſe or cart. 3. By his own hand, as *felo de ſe.* 4. By the hand of another man, where the offender is not known. 5. By the hand of another, where he is known, whether by murder, manſlaughter, *ſe defendendo*, or *per infortunium.*

(f) This was indeed the practice, tho unſupported by any authority in law; but now by 1 *Ann. cap.* 9. the witneſſes on the behalf of the priſoner in all trials for treaſon or felony are to give evidence upon oath.

1. If the inqueſt find that he died *ex viſitatione Dei*, there is no more to be done, only the inquiſition, together with the examinations, are to be returned to the next gaol-delivery, by the ſtatute of 3 *H.* 7. *cap.* 1.

2. If the inqueſt find the death *per infortunium* ſimply, as by a fall *&c.* then the coroner is to take the examination, and return the ſame with the inquiſition to the next gaol-delivery, and to inquire of the deodand, and the value, and in whoſe hands, and to ſeize and deliver the ſame to the townſhip to be anſwerable for the ſame to the king, by the ſtatute of 4 *E.* 1. *De officio coronatoris.*

But if the perſon were drowned in a pit, the coroner ſhall command the vill to ſtop it, and if it be not done, the vill ſhall be amerced in *eyre*, or before juſtices of gaol-delivery. 8 *E.* 2. *Coron.* 416.

And *note*, that in no caſe the coroner ſets any fine or amercement as for non-appearance of juries or conſtables, eſcapes of townſhips, *&c.* but only preſents it to the next juſtices in *eyre*, or now to the next gaol-delivery, and they impoſe the fine.

3. If the inqueſt find a man *felo de ſe*, they ought to find the ſpecial matter, and alſo what goods and chattels he had, of what value, and ſeize and deliver the ſame to the townſhip to be anſwerable to the king or his almoner, or the lord of the franchiſe, to whom they belong, and ſhall bind over the firſt finder of the body to the next gaol-delivery.

[63] 4. If the party be ſlain and the felon is not known, they are to find their inquiſition accordingly, and ſhall bind over the firſt finder of the body to the next gaol-delivery, and return his examinations, together with his inquiſition, by the ſtatute of 1 *&* 2 *P. & M. cap.* 13.

And *note*, that the antient manner of inquiry in this caſe, whether by the coroner or juſtices in *eyre*, was, 1. *Quis primus inventor?* 2. *An malè creditur?* If ſo, then if he were preſent, he might be arraigned; if abſent, they went on to the outlawry againſt him; but if they anſwered, *non malè creditur*, then he was diſcharged. 35 *H.* 6. 15. *a. B. Conſpiracy* 4.

5. But if the perſon was ſlain, and the party that did it was known, and the inquiſition found him guilty of the death, or that he died by his hand, there were theſe proceedings, namely,

The inqueſt were alſo to inquire of all that were preſent, aiding and abetting.

They

They ſhall alſo inquire of all acceſſaries *before* the fact, but they cannot inquire of acceſſaries *after* (*), and therefore a preſentment of a *fugam fecit* upon an acceſſary *after* is void. *Stamf. P. C.* 183, 184. 4 *H.* 7. 18. *b.*

If they find a man guilty as principal or as acceſſary *before*, they are alſo to inquire whether he fled for the ſame; for if the party be acquit upon his trial, nay tho the petit jury upon his trial find him not guilty, nor that he fled, yet this inquiſition before the coroner ſhall cauſe a forfeiture of his goods, for it is not traverſable. *Dy.* 238. *b. Stamf. P. C. p.* 183. *b.* (†).

If a party be found guilty by the coroner's inqueſt, or that he fled, they are alſo to inquire of his goods and chattels; and by the antient law the coroner was preſently thereupon to ſeize and inventory his goods, and delivery them to the *villata* to be anſwerable to the king for them, as appears by the ſtatute of 4 *E.* 1. how far this is alterd by the ſtatute of 1 *R.* 3. *cap.* 3. *vide quæ ſupra, Part* I. *cap.* 27. *p.* 365.

But it ſeems, that if there be a preſentment before the coroner of a *fugam fecit*, the ſtatute of 1 *R.* 3. takes no place as to that, becauſe, whether convict or acquit, the *fugam fecit* ſtands as [64] an unavoidable forfeiture, and therefore the coroner may without queſtion ſeize the goods ſo found by inquiſition upon a *fugam fecit*, and commit them to the townſhip.

If the perſons, that are found guilty by the inqueſt, be taken, the coroner may and muſt commit them to the ſheriff, and he is to ſend them to the gaol by the ſtatute of 4 *E.* 1. But if any were preſent and found not guilty, the coroner was to bind them over to the next gaol-delivery by the ſame ſtatute, and to record their names in his roll: This was to the intent, that if farther evidence was diſcovered againſt them, they might be there proceeded againſt, if not, then they might be uſed as witneſſes; but the ſtatute of 1 & 2 *P.* & *M. cap.* 13. hath made better proviſion; *de quo infra.*

If the parties found guilty as principals or acceſſaries *before* by the coroner's inqueſt be not to be found, the coroner might proceed to the outlawry againſt them at common law, *quod vide* 27 *Aſſiz.* 47. *viz.* by proceſs of *capias* to the ſheriff; and if they were returned *non inventi*, then they were demanded at five counties and outlawed: *vide Crompt. Juſtice, p.* 226. *b.*

(*) *Vide Part* I. *p.* 416. *in notis.* (†) *Vide Part* I. *p.* 363 & *p.* 417.

But now that courſe is alterd, and the coroner ought not to proceed to the outlawry, but is to return his inquiſition to the next gaol-delivery by the ſtatute of 3 *H.* 7. *cap.* 1. and the juſtices of gaol-delivery are to proceed againſt the offenders, if in gaol; and if not in gaol, then to certify the inquiſition into the king's bench, and there proceſs of outlawry to go againſt them upon that inquiſition.

And by the ſtatute of 1 & 2 *P.* & *M. cap.* 13. the coroner is to take the examinations againſt the principals and acceſſaries *before*, and put them in writing, and bind over witneſſes by recognizance to the next gaol-delivery, and then to return their examinations, recognizances, and inquiſitions upon pain of 40*s.* for every default.

In caſe of an indictment of murder or manſlaughter by the grand inqueſt, if the priſoner appears, plea ls, and be acquitted by the petit jury, they ſay ſo and no more, only they inquire of the flight.

[65] But if a perſon be found guilty by the coroner's inqueſt, and plead and be acquitted, yet in as much as the coroner's inqueſt have found that he was kild, the court gives credit to it, and therefore the petit jury muſt alſo give in, who it was that kild him, which ſerves as an indictment againſt that other perſon. 13 *E.* 4. 3. *b.* 14 *H.* 7. 2. *b.* and commonly if they cannot tell, they give in ſome fictitious name as *John a-Noke*, which ſerves the turn.

If there be an inquiſition of manſlaughter or murder, and alſo an indictment by the grand inqueſt of the ſame offenſe, and he is arraigned and found not guilty upon the indictment by the grand inqueſt, yet it is neceſſary to quaſh the other inquiſition or arraign the party upon it, and he is to plead *auterfoits acquit*, or *not guilty*, and ſo be acquit upon that alſo, for it otherwiſe ſtands as a record againſt him, upon which he may poſſibly be outlawed.

But if both indictments be of the ſame nature and for the ſame offenſe and be good, he may be arraigned and tried upon both at once.

By the ſtatute of *Weſtm.* 1. *cap.* 10. the coroner was to take nothing for the execution of his office touching the death of a man.

But by the ſtatute of 3 *H.* 7. *cap.* 1. in caſes of murder or manſlaughter he was to have the fee of 13*s.* 4*d.* out of the goods of the felon, or out of the amercement ſet upon the townſhip for an eſcape.

But by the ſtatute of 1 *H.* 8. *cap.* 7. for an inquiſition upon the death of a man by ſimple misfortune or miſadventure, he is to take nothing upon pain of forfeiting forty ſhillings.

1. By

1. By what hath been before ſaid it appears, that the coroner hath power to take an inquiſition of felony of the death of a man, and likewiſe of certain incidents thereunto. 1. Of acceſſaries before the fact, but not of acceſſaries after. 2. Of the eſcape of the manſlayer, that thereupon the townſhip may be amerced, which is farther confirmed by the ſtatute of 3 *H.* 7. *cap.* 1. 3. Of his flight. 4. Of his goods and chattels: But he hath no power to take an inquiſition of any other felony, tho in ſome caſes he hath power to take appeals of other matters, as ſhall be ſaid hereafter. 2 *Co.* [66] *Inſtit. p.* 32. Only by cuſtom in *Northumberland* the coroner hath power to inquire of other felonies. 35 *H.* 6. 27. *b.*

But it is ſaid that he may take the confeſſion of him, that breaks priſon, and upon his record thereof the party ſhall be hanged. 8 *E.* 2. *Coron.* 435.

2. But altho he hath power to take an inquiſition touching the death of a man, it muſt be *ſuper viſum corporis*, and not otherwiſe.

And therefore in antient times if a man were hurt in the county of *A.* and died in the county of *B.* the coroner of the county of *B.* could not take an inquiſition of his death, becauſe the ſtroke was not given in that county, nor could the coroner of the county of *A.* take an inquiſition, becauſe the body was in the county of *B.* but they uſed to remove the body into the county of *A.* and there the coroner of that county to take the inquiſition. 6 *H.* 7. 10. *a.*

But this would not avail, till the ſtatute of 2 & 3 *E.* 6. *cap.* 24. gave a remedy in this caſe by indicting and trying him in the county where he died.

But if he were ſtricken and had alſo died in the county of *A.* and the body had by ſome means been after removed into another county, he ought to be removed into the county of *A.* where he was ſtricken and died.

3. That altho he might take an indictment of death, and at common law proceed to outlawry, yet by the ſtatute of *Magna Carta*, *cap.* 17. he was diſabled to hear or determine *that* felony, or to make execution upon the outlawry.

4. But tho the coroner could not take any inquiſition but *ſuper viſum corporis*, yet in ſome caſes, that were not felony, he might take an inquiſition; as 1. *De Theſauro invento.* 2. Of wreck and royal fiſh. 3. And it ſeems he had a power to attach a perſon, that had

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dangerouſly wounded another, and that not only upon an appeal of mayhem, but alſo *ex officio*, as a thing tending to danger of death; *quod vide* 4 *E.* 1. *De officio coronatoris.*

[67] And thus far touching inquiſitions before the coroner.

II. The ſecond thing, wherein the coroner's power lies, is taking of appeals, namely appeals of murder, appeals of robbery, appeals of rape, appeals *de plagis & mahemio*; and this appears by the ſtatute of 4 *E.* 1. *De coronatoribus.*

Theſe appeals can be taken only of facts done within the county, whereof he is coroner. *Stamf. P. C. f.* 63. *a. (g).*

This appeal is to be by bill in proper perſon, and before the coroner and ſheriff: *vide ſtat.* 34 *H.* 7. *cap.* 1.

But yet the coroner is the principal judge, and therefore a *certiorari* to remove ſuch a bill may be to the coroner alone. 4 *H.* 6. 16. *a. Dy.* 222. *b.* or to the coroner and ſheriff, becauſe by the ſtatute of *Weſtm.* 1. *cap.* 10. the ſheriff hath a counter-roll. 38 *E.* 3. 14. *b. Regiſter* 284. *a. Dy.* 223. *a.* But not to the ſheriff alone neither for appeals nor outlawries, unleſs in *London.* *Dy. 317. *a.*

Altho by the ſtatute of *Magna Charta, cap.* 17. the coroner cannot determine the appeal, yet he may do theſe things. 1. He may record the nonſuit of the plaintiff in an appeal by bill before him, 22 *Aſſiz.* 93. 2. He may award a *capias* and *alias* to the ſheriff, and may thereupon demand the defendant at five counties, and outlaw the defendant, 22 *Aſſiz.* 97. tho *Stamford* makes a doubt of it, *Lib.* II. *cap.* 14. *f.* 64. *a.* and thinks that the appeal muſt be removed by *certiorari* into the king's bench, and there only proceſs of outlawry can iſſue; but when the appeal is ſued before the coroner and ſheriff, to have the appeal determind it muſt be removed into the king's bench by *certiorari.*

III. The third power of the coroner is to take the accuſation of an approver, namely when a perſon is indicted before juſtices of gaol-delivery or in the king's bench for any felony, he may confeſs the offenſe, and impeach or accuſe or appeal others of felony, and thereupon the court aſſigns him a coroner to take his confeſſion.

The coroner upon an appeal by an approver may take an appeal of
[68] the approver againſt any perſon for any felony or treaſon committed in the ſame county, or in any other county. 19 *E.* 3. 42. *Coron.* 462.

(g) & 52. *b.*

If

If the appeal be in the ſame county, it ſeems the coroner may make a precept to the ſheriff to take the perſon appeald; but if he be only a coroner of a franchiſe, it ſeems he may make a precept to the ſheriff to attach him, *quære*; but howſoever he cannot make a precept to the bailiff of the franchiſe, becauſe the bailiff of a franchiſe cannot execute a proceſs within his franchiſe, but by the precept of the ſheriff. 29 *E.* 3. 42. *Coron.* 462.

And therefore it ſeems in that caſe he muſt return the appeal before the judge of gaol-delivery within the franchiſe, and he may make proceſs within the franchiſe to the ſheriff; *vide* the caſe of *Ely*, 29 *E.* 3. 41. *b. quære*, how the uſage is there, *viz.* whether the judge makes proceſs out of the liberty, and to whom.

But if the appeal be of a felony or treaſon out of the county, the ſame muſt be removed or certified to the juſtices of gaol-delivery, and they may make proceſs into any county of *England* to take the perſon appeald; and ſo the caſe of an appeal by an approver differs from the appeal by a perſon grieved. 5 *H.* 5. *Coron.* 437. 29 *E.* 3. 42. *Coron.* 462. *Stamf. P. C. Lib.* I. *cap.* 52. *f.* 53.

IV. The fourth power of the coroner is to take the confeſſion of a felony by a felon, tho the felony were committed in any foreign county, and to take his abjuration. *Stamf. f.* 53.

But by the ſtatute of 1 *Jac. cap.* 25. continued by 21 *Jac. cap.* 28. the whole buſineſs of ſanctuary, and the abjuration before the coroner relative to ſanctuary, is taken away; and therefore it is needleſs to repeat the office or power of the coroner in relation to ſanctuary. *Co. P. C. cap.* 51.

See 1 Blackſ. Com. ch. 9. pa. 346. 4 Blackſ. Com. ch. 19. pa. 274. ch. 21. p. 292. Index to 2 Hawk. p. C. Tit. Coroner and Burn. Tit. Coroner.

CHAP. IX. [69]

Concerning the ſheriff, *his power in pleas of the crown, as well by commiſſion, as in his* Turns.

THE power of the ſheriff to hold pleas of the crown, as well as the coroners and other the king's bailiffs, is reſtrained and taken away by *Magna Charta, cap.* 17. recited in the former chapter.

Yet

Yet after that ſtatute he had power to receive indictments and preſentments of felony, tho he had not power to determine them.

And this power was of two kinds, *viz.* ſpecial by virtue of a ſpecial writ or commiſſion, and general or *virtute officii* in his *Turn*.

The former of theſe powers, *virtute brevis* or *commiſſionis*, continued in uſe till the ſtatute of 28 *E.* 3. *cap.* 9. and by that ſtatute all former commiſſions and writs of that nature are repeald; and enacted, that for the future no ſuch commiſſion or commiſſions ſhall be granted.

And therefore *H.* 37 *Eliz. B. R.* where the coroner found a death *per infortunium*, and it was furmiſed for the king, that he was *felo de ſe*, and a *melius inquirendum* prayed to the ſheriff; ruled that none ſhould iſſue, becauſe contrary to the ſtatute.

The latter power of the ſheriff is *virtute officii*, and this ſtill continues in the ſheriff, namely, that he hath power in his *Turn* to take inquiſitions of felonies, that were felonies at common law; but the ſheriff cannot take any inquiſition of any felony created by act of parliament, unleſs the ſame act likewiſe gives him juriſdiction; and therefore the ſheriff in his *Turn* cannot take an inquiſition of rape.

[70] This court is a court of record, and the ſheriff or his ſteward or clerk is judge in it, the ſtyle *Placita coram vicecomite com'* S. *in Turno*.

The indictments taken here have theſe requiſites.

1. That the courts be held *infra menſem Paſchæ, & menſem Michaelis* by the ſtatute of 31 *E.* 3. *cap.* 15. or elſe they loſe their turn for that time, which hath been expounded their court ſo held for that turn only ſhall be void. *Stamf. P. C. f.* 84. *b.* 6 *H.* 7. 2. *a.* 38 *H.* 6. 7. *a.*

2. The indictment muſt be under the ſeals of the indictors, and by twelve jurors at leaſt by the ſtatute of *Weſtm.* 2. *cap.* 13. *(a)*. And by the ſtatute of 1 *E.* 3. *cap.* 17. it muſt be by rolls indented between the ſheriff and the indictors, (which laſt ſtatute extends alſo to leets and franchiſes,) otherwiſe the indictments are void; and one of the indictors muſt ſhew one part of the indenture to the juſtices, when they come to make deliverance.

3. By the ſtatute of 1 *R.* 3. *cap.* 4. the indictors in the ſheriff's *Turn* muſt have 20*s.* freehold, or 26*s.* 8*d.* copyhold, and be of good name, otherwiſe the ſheriff or bailiff ſhall forfeit 40*s.* and the indictment is void.

(a) 2 *Co. Inſtit. p.* 337.

And

And therefore, if any be arraigned of felony upon ſuch an indictment, he may plead that one of the indictors had not 20*s.* freehold, nor 26*s.* 8*d.* copyhold; ſo that when it is ſaid *it ſhall be void*, it muſt be intended void by plea; for if the priſoner excepts not to it upon his arraignment, he is concluded by that omiſſion.

Upon theſe indictments of felonies in the ſheriff's *Turn*, tho they could not proceed to hear and determine them by reaſon of the ſtatute of *Magna Charta*, *cap.* 17. yet the ſheriff did commonly make out proceſs or precepts in nature of *capias* to arreſt the parties, as appears by the ſtatute of *Weſtm.* 2. *cap.* 13.

But now by the ſtatute of 1 *E.* 4. *cap.* 2. their power of making out proceſs upon theſe indictments is taken away, as well in caſe of indictments of felony, as other miſdemeanors within their cognizance; but they are to deliver all ſuch preſentments and indictments to the juſtices of the peace at their next ſeſſions, who are [71] to make out proceſs thereupon, and hear and determine them; but if the original preſentment were not within the juriſdiction of the *Turn*, the juſtices of peace ought not to proceed upon ſuch indictments, tho removed before them. 4 *E.* 4. 31. *a.* 8 *E.* 4. 5. *b.*

And what hath been ſaid touching the *Turns* of ſheriffs is in a great meaſure applicable to leets, namely they have power to receive indictments of felonies at common law, but not of felonies by act of parliament, unleſs ſpecially limited to them.

The ſtatutes of *Magna Charta*, *cap.* 17. 1 *E.* 3. *cap.* 17. extend to them as well as to *Turns*, but not the ſtatute of 1 *E.* 4. and therefore they cannot hear and determine felonies preſented in them, but muſt ſend their indictments of felonies to the juſtices of gaol-delivery there to be heard and determined, if the offenders are in cuſtody, 8 *H.* 4. 18. *a.* *Franchiſe* 2. or remove by *certiorari* into the king's bench, that proceſs may be made upon them to an outlawry.

And thus far concerning the ordinary juriſdiction, wherein felonies are inquired of, heard or determined; I have wholly omitted the courts in *eyre*, the courts of the *ſtaple*, and the franchiſe of *infangthief* and *unfangthief*, becauſe they are wholly diſuſed, and the learning concerning them rather for curioſity and antiquity, than for uſe in this buſineſs of pleas of the crown. The juriſdiction alſo of the royal franchiſes of *Ely*, *Hexham* and *Hexhamſhire*, and other particular franchiſes remaining excepted by the ſtatute of 27 *H.* 8.

cap.

cap. 24. are but particular juriſdictions, and not ſo uſeful for the pleas of the crown, as for a tract concerning the juriſdiction of courts.

And thus far touching the ordinary juriſdictions in caſes capital.

See 1 Blackſ. Com. ch. Introd. p. 116. ch. 9. 339. 4 Blackſ. Com. ch. 21. pa. 292. ch. 33. p. 413. 428. ch. 19. p. 273. and Burn. Tit. Sheriff. per tot. and Index to 2 Hawk. P. C. Tit. Sheriff. Tit. Turn.

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[72] CHAP. X.

Concerning the apprehending *or* arreſting *of felons and traitors by* private perſons, *and* eſcapes.

HAVING in the foregoing chapters conſidered the ſeveral courts of ordinary juriſdiction, where traitors and felons are to be proceeded againſt, I ſhall now deſcend to the conſideration of the means and method of bringing ſuch offenders to trial, judgment, and execution.

And herein I ſhall obſerve this order, firſt to conſider thoſe courſes, that are preliminary to their arraignment, and afterwards to conſider of their arraignment, and thoſe proceedings, that are ſubſequent thereunto, their trial, judgment, and execution.

Concerning the former, namely the courſes preliminary to their arraignment, they are principally theſe, *viz.* 1. The arreſt or apprehending of them. 2. Their impriſonment or commitment, and therein of bailing or diſcharging them before indictment. 3. Their indictment.

Touching the firſt of theſe, namely their arreſts or apprehending them.

This is the firſt inſtance of their proſecution, and this is done either, 1. By private perſons by virtue of the law, or 2. By officers or *virtute officii*, or 3. Upon hue and cry levied, or 4. By warrant or precept *virtute præcepti*.

But before I come to theſe I will conſider ſomething concerning eſcapes of felons, and what puniſhment lies upon *them* that permit it, which will open the conſideration of what is every perſon's duty in this caſe; and by this eſcape I do not mean eſcapes ſuffered by ſheriffs

riffs or gaolers, but eſcapes ſuffered by vills, townſhips, or private perſons.

If there be a murder or manſlaughter committed either in the day or night in an incloſed town, if the murderer be not [73] taken, the town or city ſhall be amerced upon a preſentment thereof, either by the coroners or grand inqueſt before the juſtices of gaol-delivery. 3 *E.* 3. *Coron.* 299. But if it were a vill not incloſed; there if a murder were committed within the precinct of the vill, tho in the field, and the murderer not taken, if it were done in the night, the vill ſhould not be amerced; but if it were in day-light, tho in the evening, the town ſhould be amerced. 3 *H.* 7. *cap.* 1. 3 *E.* 3. *Coron.* 293.

And the ſame law is if the killing were by a man by miſadventure, if he eſcapes and be not taken. 3 *E.* 3. *Coron.* 302. for tho by the ſtatute of *Marlebr. cap.* 26. that common fine or amercement called *murdrum* (*) was not to be impoſed in caſes of death *per infortunium*, yet the amercement called *eſcapium* took place even in that caſe. *Vide Bracton, Lib.* III. *cap.* 15.

If the malefactor were taken by the townſhip, and delivered to the ſheriff or his bailiff, or to the gaoler of the county, and then an eſcape happen, the townſhip is not chargeable, but the ſheriff or bailiff. 3 *E.* 3. *Coron.* 337.

But if he be in guard of the conſtable, and the conſtable is bringing him to the gaol, yea tho the gaoler refuſed to take him, if he eſcapes, it is a charge upon the vill. 3 *E.* 3. *Coron.* 346. 10 *H.* 4. 7. *a. Eſcape* 8. *per Gaſcoigne*; nay, tho in the flight he be ſlain for neceſſity of retaking him becauſe he reſiſts, yet it is an eſcape upon the vill. 3 *E.* 3. *Coron.* 328.

And in caſe the vill be not ſufficient to anſwer the amercement, the hundred ſhall be charged therewith, and in default of the hundred, the county; and if the killing be out of any vill, the hundred is amerceable for the eſcape. 8 *E.* 2. *Coron.* 425. *Stamf. P. C. Lib.* I. *cap.* 31. *f.* 34. *b.*

But this is only in caſe of felony touching the death of a man, for there the fact is apparent, that the man is ſlain; but in caſe of other felony, as theft, there tho the thief be not taken, no amerce-mercement lies upon the town, nor other penalty at common [74] law, but by the ſtatute of *Winton, de quo infra.*

(*) *Vide Part* I. *p.* 39. 425. 447.

But

But if they had a felon in their cuſtody, or in the cuſtody of the conſtable, and he eſcape, the vill had been amerceable, and ſo is the hundred, if they have him in their cuſtody, or in the cuſtody of the conſtable of the hundred, and ſuffer him to eſcape. 3 *E.* 3. *Coron.* 316.

The law uſed in the time of *H.* 3. when *Bracton* wrote, appears *Lib.* III. *cap.* 10. to be thus: if a man had committed manſlaughter either by misfortune or otherwiſe, if he fled, and the jury were inquired of by the judge if he were *in decennâ*, then the *decenna* was to be amerced by the court, becauſe they had him not there; if he were not in any *decenna*, then the vill was to be amerced; becauſe they received him an inhabitant, and had him not *in franco plegio*; for every one above twelve years old ought to be in frank-pledge, except clergymen, noblemen, and knights and their families (*): and therefore in the caſe of clergymen, noblemen and knights, if any of their family *de manupaſtu* committed a murder or manſlaughter, the clergyman, nobleman or knight was amerced if the malefactor fled, unleſs ſome ſpecial cuſtom had abrogated it, as in *Hertfordſhire:* and thus did the practice long after continue: *vide* 8 *E.* 2. *Coron.* 428. *Si ſerviens alicujus domini in ſervitio ſuo exiſtens facit feloniam & convincatur, quamvis poſt feloniam ipſius non receptavit, amerciandus eſt*; and 3 *E.* 3. *Itin. North'ton, Coron.* 203. It was preſented, that *A.* had *killed B.* and it was demanded of the preſenters, whether he were *in decennâ?* They anſwered, *He was not?* Then it was demanded where he abode? They ſay with the parſon of the town; and thereupon the parſon was amerced for his *manupaſt.* Then it was demanded who was preſent when he ſlew him? They ſay *C.* It was then demanded of them, whether *C.* received him [took him]? They ſay *Not*; wherefore *C.* was amerced. Then it was demanded where the felon was? They ſay *he is eſcaped*; then it was demanded whether it were done in the day or the night? They anſwer *in the evening*; therefore the whole vill was amerced.

[75] Several things are obſervable in this caſe. 1. That if he had been *in decennâ*, the *decenna* had been amerced, becauſe they had not him preſent *ad ſtandum recto in curiâ.* 2. That becauſe the parſon nor his family were not by law to come to the view of frank-pledge, he was amerced for one that was of his family, one *de manupaſtu.* 3. That he that was preſent and took not the offender,

(*) *Vide Part* I. *p.* 65, *in notis.*

was

was alſo amerced. 4. That becauſe the felony was committed in the day-time, and the felon eſcaped, the whole vill was amerced, 22 *E.* 3. *Coron.* 238. ſo in effect three amercements for one eſcape.

And *note*, that according to *Bracton*, *ubi ſupra*, he is *de manupaſtu*, *qui eſt ad victum & veſtitum*, or *ad victum cum mercede*, as a houſhold ſervant; and according to the antient law, he that entertained a man three nights, made him to be *de manupaſtu*.

This law of amercing the *decenna*, or him of whoſe family an offender is, is not abrogated, but yet it is not now uſed; but it was certainly a moſt excellent conſtitution, whereby every man was under the pledge of his maſter or father, with whom he lived, or muſt be within ſome *decenna* that may ſee him forthcoming: *vide Spelman in Gloſſar. Titul.* Friburg & *Leges Edvardi*, *cap.* 19. 20. *(a)*.

As thus the vill is anſwerable for an eſcape, ſo is he that is preſent when a manſlaughter or murder is committed, and doth not do his beſt endeavour to apprehend the malefector, though he were not party or acceſſary to the crime; with this agrees 8 *E.* 2. *Coron.* 428. beforementioned, where it is called only an amercement; but 8 *E* 2. *Coron.* 395. he that was of full age, that was preſent when a manſlaughter was committed, *et ne leva le maine d' attach le felon*, was committed to priſon, till he made fine to the king, but he that was within age was diſcharged *(b)*.

And tho in the book of 14 *H.* 7. 31. *b.* a perſon indicted for being preſent at a felony, without ſaying he was aiding and abetting, was diſcharged, it was becauſe the indictment there was with intent to make him a felon, and not to charge him with a miſdemeanor for not purſuing the felon: *vide Co. P. C. p.* 117. It is a miſdemeanor, for which the party ſhall be fined and impriſoned. [76]

By that which hath been ſaid, it appears, that the apprehending of a felon is in many caſes a duty, and not arbitrary, even in caſes of a private perſon, without any other warrant than what the law gives, and that the omiſſion thereof is a miſdemeanor, and puniſhable by fine or amercement.

And now therefore I come to conſider touching the arreſts by a private perſon in caſe of felony.

And this is of theſe kinds. 1. Where the party arreſted hath really committed a felony, and this is known to the party arreſting. 2. Where the party arreſted hath really committed a felony, but it is only

(a) Wilk. Leg. Anglo-Sax. p. 291. *(b) Vide Part* I. *p.* 21.

ſuſpected, and not certainly known to the party arreſting. 3. Where there hath been a felony committed, and the party arreſting doth, upon probable grounds, ſuſpect the perſon arreſted to have committed it, tho in truth he did it not.

I. As to the firſt of theſe, where a perſon hath committed felony, and *A.* knows it.

It is true in this caſe, if the time and nature of the fact, and the condition of things will bear it, it is beſt to complain to a juſtice of peace, and have his warrant for the apprehending of him; or if that cannot be had in convenient time, then to call to his aſſiſtance the conſtable; but ſuch the caſe may be, that the delay that muſt ariſe neceſſarily by theſe ſolemnities, may give the felon opportunity to eſcape; and therefore in this caſe *A.* without any other authority than what the law gives him, may arreſt or apprehend the felon; and if he cannot do it by his own ſtrength, he may call others to his aſſiſtance, or raiſe hue and cry for his apprehenſion; and if he doth not thus, he is puniſhable, as is above declared, if it can appear that he knew it.

And it will be all one, whether the felony were committed in the ſame county, or in any other county; for the law in this caſe makes *A.* an officer; and this was antiently the law, and ſtill is. *Bracton Lib. ult. in fine, in criminalibus cauſis, ubi ſequi debet capitale ſupplicium, vita videlicet vel mutilatio membrorum, non ſequitur attachiamentum aliquod, ſed corpus talis, quicunque ille fuerit, ab omnibus arreſtetur, qui ſunt ad fidem domini regis, ſive inde præceptum habuerit, ſive non habuerit*; and accordingly it is ruled, 10 *E.* 4. 17. *b.* that it is a good juſtification for a man in an action of falſe impriſonment to ſay, that the plaintiff committed a felony, and ſhew what, and the defendant arreſted him, and delivered him to the conſtable, or he might have brought him to gaol by himſelf or his ſervant, as is there agreed.

[77]

But the ſafer way is, to bring him before a juſtice of peace, who may examine and commit him.

And as a private man may do thus upon a felony committed, ſo if he ſee danger of murder by a dangerous wound given, he may purſue the offender. 7 *E.* 3. 16. *Barré* 291.

And in both theſe caſes, he may break open doors, if he be denied entrance, and if *de facto* the felon or malefactor be there, for the law makes him an officer in this caſe, as well as if he were a juſtice of peace or conſtable. 7 *E.* 3. 16. *b.*

Nay

Nay yet farther, if the felon reſiſts or flies, ſo that he cannot be taken without killing him, this is juſtifiable, and no felony; but ſtill it muſt be where he cannot be otherwiſe taken, for it is for advancement of juſtice, and ſuppreſſion of felons, and therefore if they cannot be otherwiſe apprehended, it is lawful, as well as if *A.* were a conſtable, or had a warrant; and if the books that ſpeak of this matter, be but carefully examined, it will appear that the law was ſo generally taken, tho he were purſued or taken without any formal proceſs to the ſheriff, and that as well before an arreſt made, as after; and this appears *in terminis*, 22 *Aſſiz.* 55. 3 *E.* 3. *Coron.* 346, & 328, & 290. but indeed the books of 3 *E.* 3. *Coron.* 288, 289. are of a conſtable and watchman: but in 3 *E.* 3. *Coron.* 349. the townſmen that did it were fined 40*s.* but it ſeems it was more for the eſcape than the killing: *vide Stamf. P. C. Lib.* I. *cap.* 6. *f.* 13. *a. b. accordant.*

As to the ſtatutes of *Magna Charta, cap.* 29. 25 *E.* 3. *cap.* 4. 28 *E.* 3. *cap.* 3. 42 *E.* 3. *cap.* 3. they do not at all concern this preparatory impriſonment of a felon, as ſhall be ſhewn in due time; and therefore whatſoever hath been before ſaid holds true in [78] the firſt inſtance of his impriſonment, tho the party be not yet indicted.

II. As to the ſecond caſe, *viz.* where a felony is committed by *B.* but *A.* that arreſts him, doth not certainly know it, as not being preſent at the committing of it.

I take the law to be all one with the former caſe, only what he doth herein, he doth at his peril; for if in truth *B.* be a felon, then *A.* may arreſt him, and may break a houſe to arreſt him, if he be within the houſe, and refuſes to render himſelf; yea, and if he will not ſuffer himſelf to be taken, he may in caſe of neceſſity be killed; but this ſtill is at the peril of *A.* for if he be no felon, it may be manſlaughter at leaſt in *A.* if he doth it.

But how far forth this will be juſtifiable in caſe that *A.* hath a good cauſe of ſuſpicion, will be conſiderable in the next enquiries.

III. The third caſe is, there is a felony committed, but whether committed by *B.* or not, *non conſtat*, and therefore we will ſuppoſe, that in truth it were not committed by *B.* but by ſome perſon elſe, yet *A.* hath probable cauſes to ſuſpect *B.* to be the felon, and accordingly doth arreſt him; this arreſt is lawful and juſtifiable, and the reaſon is, becauſe if a perſon ſhould be puniſhed by an action of treſpaſs, or falſe impriſonment for an arreſt of a man for felony under theſe cir-

cumſtances, malefactors would eſcape to the common detriment of the people.

But to make good ſuch a juſtification of impriſonment, 1. There muſt be in fact a felony committed by ſome perſon; for were there no felony, there can be ground of ſuſpicion. Again, 2. The party, (if a private perſon), that arreſts, muſt ſuſpect *B.* to be the felon. 3. He muſt have reaſonable cauſes of ſuch ſuſpicion, and theſe muſt be alledged and proved.

1. There muſt be a felony done; and therefore if a man be taken for ſuſpicion of felony, and delivered to the conſtable, or remains in the cuſtody of him that took him, yet if in truth no felony were committed, he may be let go at large, and no puniſhment ſhall enſue for the eſcape. *Kelw.* 34. *a. b.* But if a felony were committed, [79] though he that is taken for the ſuſpicion thereof be in truth innocent, and it ſo appears to the conſtable, or him that arreſts him; yet if he let him go before he be indicted, and acquitted or delivered by proclamation before the juſtices of gaol-delivery, the party letting him go ſhall be puniſhed for an eſcape. 44 *Aſſiz.* 12. *Poulton de Pace, f.* 146. *b.* 5 *H.* 7. 4. 7 *H.* 4. 35. *a.*

2. The party that arreſts him, muſt be he that ſuſpects him, and regularly it cannot be done by another; and therefore if a man juſtifies in falſe impriſonment for ſuſpicion, he muſt juſtify it as his own act, and not by the command of the ſheriff or other officer, nor can another juſtify by the command of him that ſo ſuſpects. 11 *E.* 4. 4. *b.*

But this doth not always hold true; for an officer of juſtice, may, in aſſiſtance of him that ſuſpects, juſtify the impriſonment; as a conſtable, upon a complaint made to him by him that ſuſpects, may juſtify; but he muſt allege his juſtification in the ſame manner as he that ſuſpected ought, *viz.* a felony done and cauſe of ſuſpicion; and therefore the party ſuſpecting and deſiring the conſtable's aſſiſtance muſt acquaint him with the whole matter, and the cauſes of his ſuſpicion, otherwiſe he is not bound to aſſiſt him. 2 *H.* 7. 15. *b.* And in like manner a juſtice of peace being applied to by him that ſuſpects and acquainted with the whole circumſtances of the caſe (*).

And this appears beyond diſpute even by the ſtatute of 34 *E.* 3. *cap.* 1. whereby power is given to the juſtices of peace to arreſt all thoſe whom they find by indictment or by ſuſpicion, and to put them in priſon.

(*) *Vide Part* I. *p.* 580.

And

And the reaſon is apparent, namely, the juſtices of peace are made judges of the reaſonableneſs of the ſuſpicion, and when they have examined the party accuſing touching the reaſons of their ſuſpicion, if they find the cauſes of ſuſpicion to be reaſonable, it is now become the juſtice's ſuſpicion as well as theirs, and accordingly adjudged, *P.* 43 *Eliz. C. B. Croke, n.* 35. *Tatam*'s caſe *(c)*, and therefore the ſaying of my lord *Coke*, 4 *Inſtit. p.* 177. "That notwithſtanding ſuch "warrant, or the aid of the conſtable upon ſuch complaint, [80] "it is ſtill the party's arreſt, and not the conſtable's or juſ- "tice's, and that he muſt be preſent, and that he cannot break open a "door by virtue of ſuch warrant," is neither warranted by the law nor the common practice (*); and in the book of 2 *H.* 7. 15. *b.* where one juſtified in aid of the conſtable upon a felony done, and a ſuſpicion and cauſe thereof, *ut infra*, it was ruled a good juſtification againſt the opinion of *Bryan*; and it is apparent by the ſtatute of 5 *E.* 3. *cap.* 14. "If any perſon hath any evil ſuſpicion of perſons to be "robberds-men, waſters or draw-latches, they ſhall be incontinently "arreſted by the conſtables of the town, be it by day or night; and if "they be arreſted within franchiſes, they ſhall be delivered to the "bailiff of the franchiſe; if in the gildable, to the ſheriff, and kept in "priſon till the coming of the juſtices."

The ſuſpicion may be by any perſon, yet the impriſonment muſt be by the conſtable; and the reaſon is that which is given before, becauſe the conſtable is a proper officer, to whom complaints of this nature may be made.

And therefore if a felony be committed upon the goods of *A.* and the goods be found in the cuſtody of *B.* and *A.* comes to a conſtable and ſhews him the caſe, and requires him to bring him before a juſtice; this is a good juſtification by *A.* in falſe impriſonment brought againſt him without ſo much as an averment, that he ſuſpected him. *H.* 4. *Car. Rot.* 513. *Marbery* and *Porter*, *B. R. vide* 2 *E.* 4. 8. *b.*

But it is true, that he that is not an officer cannot juſtify by the command of him that ſuſpects, if he alſo be no officer; and ſo are the books of 5 *H.* 7. 5. *a. per Cur'.* 12 *Co. Rep.* 92. Sir *Antony Aſhley*'s caſe, 11 *E.* 4. 4. *b.*

But then the caſe is eaſily ſolved, for if a felony be committed, and *A.* hath probable cauſe to ſuſpect *B.* and accordingly ſuſpects *B.* and acquaints *C.* with the whole matter, *C.* upon this having probable

(c) Cro. Eliz. p. 829. (*) *Vide Part.* I. *p.* 579.

 cauſe

cauſe to ſuſpect *B.* tho he cannot juſtify the impriſonment of *B. as by the command of A.* that firſt ſuſpected him, he may juſtify *by his own ſuſpicion*; and the like of him that comes in aid of *A.* to arreſt *B.* 5 *H.* 7. 4 & 5.

[81] 3. The third thing to be obſerved in this arreſt by a private perſon upon ſuſpicion is, that he hath a probable cauſe of ſuſpicion.

And theſe probable cauſes are very many, as for inſtance common fame, 5 *H.* 7. 4. *b.* 2 *H.* 7. 15. *b.* 11 *E.* 4. 4. *b.* &c. hue and cry levied, 21 *H.* 7. 28. hath part of the goods found upon him, or be indicted of the like, 12 *Co. Rep.* 92. *Aſhley*'s caſe, party with him that committed the robbery. 7 *E.* 4. 20. *a.*

And *note*, that the law hath that care, that malefactors, tho but ſuſpected, ſhould be apprehended, that a man may alledge twenty cauſes of ſuſpicion, and it ſhall not make his plea double, for one anſwer makes an iſſue upon the whole, *viz. de injuriâ ſuâ propriâ abſque tali cauſâ*, and no iſſue ſhall be ſingly taken upon one cauſe of ſuſpicion, where many cauſes are thus alledged. 2 *E.* 4. 8 & 9. 7 *E.* 4. 20. *a.*

Now what is to be done by a private perſon, that thus arreſts a party upon ſuſpicion of felony; if after ſuch an arreſt the party arreſting diſcharge him without bringing him to a juſtice or conſtable, he ſhall be puniſhed for the eſcape at the king's ſuit, but it makes not the impriſonment unlawful as to the party. 10 *E.* 4. 17. *b.*

Or he may carry him to the gaol, and if the gaoler receive him, he that made the arreſt is diſcharged, 10 *E.* 4. 18. *a.* but he muſt not carry him to a gaol of any other county than where he is taken, unleſs either there be no gaol in the county, or that he cannot for the danger of rebels bring him to that gaol. 11 *E.* 4. 4.

Or he may deliver him to the conſtable of the vill, and that is a ſufficient diſcharge, 10 *E.* 4. 17, *b.*

But the proper way is to bring him to a juſtice of peace, who may commit, or diſcharge, or bail him, as the caſe requires.

Yet if the party ſo arreſted be ſick and cannot be removed without danger of death, he may detain him in his own houſe, till he can reaſonably bring him to a juſtice or officer, 2 *E.* 4. 8. *b.*

[82] The arreſt of a man upon ſuſpicion of felony by a private perſon is, as before is ſaid, a thing permitted by law and therefore juſtifiable; but it is not a thing commanded by law, neither

is

is the party puniſhable, if he omit it, as in caſe where it is a known felony, or where done upon hue and cry levied, or by an officer, or by a precept; for no man is judge of a man's ſuſpicion but himſelf (*).

And therefore there is not the ſame privilege in all points allowed to him that arreſts upon ſuſpicion, as to him that arreſts upon hue and cry, or by warrant, or where he is preſent at the felony committed, and ſo knows it.

1. It ſeems he that arreſts as a private man barely upon ſuſpicion of felony, cannot juſtify the breaking open of doors to arreſt the party ſuſpected, but he doth it at his peril, *viz.* if in truth he be a felon, then it is juſtifiable, but if he be innocent, but upon a reaſonable cauſe ſuſpected, it is not juſtifiable, 4 *Co. Inſtit. p.* 177, 178. (but yet to prevent a murder or manſlaughter a private perſon may break open a door, 12 *H.* 8. 2. *b.*) but he may enter by the doors open, and make the arreſt in the houſe.

But *note*, that in all arreſts he muſt acquaint the party with the cauſe of his arreſt.

But in caſe of a known felony done by the party, or where a felony is done, and a conſtable comes and demands entrance upon a complaint to him, or by a juſtice of peace's warrant, or upon hue and cry; there the doors may be broken open upon notice and demand of entrance and refuſal.

2. Again, if there be a felony committed by *B.* and *A.* is preſent and ſees it, and purſues the felon, and he cannot be otherwiſe taken, and *A.* kills him in the purſuit, tho he have not arreſted him, the law juſtifies him; and poſſibly the ſame law may be in caſe of an officer, a warrant, or hue and cry, tho the perſon be not guilty of the fact, if he refuſes to ſubmit to the arreſt; but *de hoc infra.*

But if a felony be committed, and *A.* upon probable cauſe ſuſpects *B.* to have been the felon, tho the law permits him to arreſt *B.* tho in truth innocent, yet he cannot juſtify the killing of him upon his flight and refuſing to ſubmit, *juſticiari ſe permittere nolens*; but if he kills him, it is at his peril; for if *B.* be innocent, it is at leaſt manſlaughter, *Co. P. C. p.* 56. 221. 22 *Aſſiz.* 55. and the reaſon is, becauſe *B.* is not bound to take notice of *A.* as authorized to arreſt him, as being no officer, nor having any warrant; it is true, a conſtable arreſting in the king's name, or offering ſo to do, the party is

[83]

(*) *Vide Part* I. *p.* 490.

bound to take notice and ſubmit, as hath been ſaid, *Part* I. *cap.* 37. but a mere ſtranger offering to do it, a man is not bound to take notice of his authority, and therefore may fly from him if innocent, for poſſibly he may think he came to rob him.

3. Yet farther, if an innocent perſon be actually arreſted upon ſuſpicion by a private perſon, all circumſtances being duly obſerved, and he breaks away from the arreſt, yet I do not think the perſon arreſting can kill him, tho he cannot be otherwiſe taken, for the perſon arreſted is not bound to take notice of that authority that the law gives to a private perſon in this caſe.

But then can he juſtify the beating or ſtriking of him in caſe he cannot otherwiſe take him that thus makes the aſſault? As where a bailiff of the ſheriff by warrant arreſteth a perſon, tho he cannot ſtrike or beat him before the arreſt to take him; yet after the arreſt and eſcape ſuch bailiff may juſtify his beating, if he cannot otherwiſe retake him according to the opinion of the book, 2 *E.* 4. 6. *b.*

And it ſeems he cannot, but only lay his hands gently upon him to lay hold of him for the reaſon before given.

4. But then ſuppoſe that either before the arreſt or after the arreſt, *B.* draws his ſword and aſſaults *A.* and *A.* preſſeth upon him either to take or detain him, and in the conflict *B.* kills *A.* is it murder in *B.* or if *A.* kills *B.* is it juſtifiable and no felony in *A?*

If the bailiff of a ſheriff is about to take a priſoner, and before he takes him the party draws his ſword and kills him, this is murder, as is before ſaid, *Part* I. *cap.* 37. And on the other ſide, if either after or before the arreſt, the bailiff upon aſſault made upon him kills the
[84] party, this is no felony, neither is he bound to give back to the wall. *Co. P. C. p.* 56 & 221.

It ſeems, that if the party arreſted kills him that thus arreſts upon ſuſpicion, always ſuppoſed the party killing is innocent,) this is but manſlaughter and not murder; and on the other ſide, if the party arreſting kills the party arreſted or intended to be arreſted by him upon ſuſpicion, that this is manſlaughter; and tho the arreſt in this caſe had been lawful, yet the party arreſting hath not the ſame privilege, as in caſe of killing a man upon hue and cry, tho the party arreſted after the arreſt, or upon the attempt of the arreſt, aſſaulted him that arreſted him or attempted to arreſt him. 1. Becauſe in this caſe, tho the law impowers the party to arreſt him, yet it is but a power of permiſſion, not an injunction by the law, neither is he puniſhable if he had

had not made ſuch an arreſt; and ſo not like the caſe of an arreſt by an officer, warrant of a juſtice, hue and cry, where it is a duty to arreſt, and the party, that omits his duty in this caſe, is puniſhable by fine and impriſonment for his omiſſion. 2. Becauſe he might have had a legal warrant from a juſtice of peace, or called an officer to his aſſiſtance, and then he had been under a more effectual protection of the law in what he did in purſuance of his duty. 3. It would give too great a latitude for perſons to be their own judges in this caſe, and to take away a man's life who is innocent, and poſſibly might not have ſufficient aſſurance, that either a felony had been committed, or that he that arreſts had a juſt or lawful cauſe of ſuſpicion.

And it ſeems the law is the ſame, whatſoever the cauſe of ſuſpicion were, yea altho the perſon were indicted for the offence, becauſe a perſon innocent may be indicted, and becauſe there is another way to bring him into an anſwer, namely proceſs of *capias* to the ſheriff, who is a known reſponſible officer. 3 *E.* 3. *Coron.* 346.

And thus far concerning arreſting by a private perſon upon ſuſpicion.

See Burn. Tit. Arreſt per tot. & Index to 2 Hawk. P. C. tit. Arreſt. Foſter. 136. 319, 320. and 4 Blacks. Com. ch. 21. of Arreſts. pa. 289, &c.

CHAP. XI. [85]

Concerning arreſts *or* apprehenſion of felons, *or perſons* ſuſpected of felony *by an* officer.

THERE are certain officers and miniſters of public juſtice, that *virtute officii* are empowered by law to arreſt felons, or thoſe that are ſuſpected of felony, and that before conviction, and alſo before indictment.

And theſe are under a greater protection of the law in execution of this part of their office upon theſe two accounts. 1. Becauſe they are perſons more eminently truſted by the law, as in many other acts incident to their office, ſo in this. 2. Becauſe they are by law puniſhable, if they neglect their duty in it.

And therefore it is all the reaſon that can be, that they ſhould have the greateſt protection and encouragement in the due execution of their

their office, ſince their actings herein are not arbitrary but neceſſary duties, (not permiſſions,) and under ſevere puniſhments in their neglect thereof.

And hence it is, that theſe officers, that are thus intruſted, may without any other warrant but from themſelves arreſt felons, and thoſe that are probably ſuſpected of felonies; and if they be aſſaulted and killed in the execution of their office, it is murder; and, on the other ſide, if perſons that are purſued by theſe officers for felony or the juſt ſuſpicion thereof, nay for breach of the peace or juſt ſuſpicion thereof, as night-walkers, perſons unduly armed, ſhall not yield themſelves to theſe officers, but ſhall either reſiſt or fly before they are apprehended, or being apprehended ſhall reſcue themſelves and reſiſt or fly ſo that they cannot be otherwiſe apprehended, and are upon neceſſity ſlain therein, becauſe they cannot be otherwiſe taken, it is no felony
[86] in theſe officers or their aſſiſtants, that upon inevitable neceſſity kill them, tho poſſibly the parties killed are innocent, for by their reſiſtance againſt the authority of the king in his officers, they draw their own blood upon themſelves.

The officers that I herein principally intend are, 1. Juſtices of the peace. 2. Sheriffs. 3. Coroners. 4. Conſtables. 5. Watchmen. And when I mention theſe I alſo include all, that come in their aid and aſſiſtance; for every man in ſuch caſes is bound to be aiding and aſſiſting to theſe officers upon their charge and ſummons, in preſerving the peace and apprehending of malefactors, eſpecially felons.

And if any being thereunto called ſhall not give their aſſiſtance, they are to be puniſhed by fine and impriſonment, and conſequently are under the common protection of the law equally with the officers themſelves.

And that was the reaſon of the ſtatutes of 7 *Jac. cap.* 5 and 21 *Jac. cap.* 12. that gave power as well to aſſiſtants of the moſt uſual peace-officers, as to the officers themſelves, to plead the general iſſue, and give the ſpecial matter of their juſtification in evidence, and allow double coſts to the defendant.

Whereſoever a private perſon may arreſt a felon or perſon ſuſpected, there any of theſe officers may do it; but of this ſufficient hath been ſaid before: I therefore come to that power, that concerns them ſpecially as officers in this caſe.

I. *Juſtices*

I. *Juſtices of peace* have a double power as in relation to arreſt of felons; one upon complaint of another perſon, whereof hereafter, *cap.* 13. Another primitive and original in themſelves, whereof at preſent.

If a juſtice of peace ſee a felony, or other breach of the peace, committed in his preſence, he may in his own perſon apprehend the felon.

And ſo he may by word command any perſon to apprehend him, and ſuch command is a good warrant without writing; but if the felony or other breach of the peace be done in his abſence, then he muſt iſſue his warrant in writing under his ſeal to apprehend the malefactor, 14 *H.* 7. 9. *b.* adjudged; and by *Fineux*, if there be any riot or breach of the peace like to happen by a tumultuous meeting, &c. he may command his ſervants or others to pre- [87] vent it by arreſting the parties.

And *note*, that if the juſtice of peace hath either from himſelf or by a credible information from others knowledge of a felony done, and juſt cauſe of ſuſpicion of any perſon, he may himſelf arreſt and commit that perſon, 14 *H.* 7. 8. *per Keble*; and according to it are the expreſs words of the ſtatute of 34 *E.* 3. *cap.* 1. beforementiond.

II. Secondly, As to the *ſheriff*, it is ordaind by the ſtatute of *Weſtminſt.* 1. *cap.* 9. *(a)*, "That all generally be ready and ap- "pointed at the commandment and ſummons of the ſheriff, and at the "cry of the country to ſue and arreſt felons, when any need ſhall "be, as well within franchiſes as without, and they that will not ſo "do, and thereof be attaint, ſhall make grievous fine to the king, "and if default be found in the lord of the franchiſe, the king ſhall "take the franchiſe to himſelf, &c. And if the ſheriff, coroner, or "bailiff, will not attach or arreſt ſuch felons there, as they may, or "will not do their office for favour borne, to ſuch miſdoers, and be "attaint, they ſhall have a year's impriſonment and after make "grievous fine, if they have wherewith, and if not three years im- "priſonment."

By this ſtatute the ſheriff is not only enabled but injoind to arreſt felons, and all perſons are required to be aſſiſting to him therein upon his ſummons; and they are punithable by fine and impriſonment in default thereof.

(a) 2 *Co. Inſtit. p.* 172.

And

And altho the ſheriff in his *Turn* had power to take preſentments of felonies at common law, yet this was not intended barely of iſſuing precepts upon ſuch inquiſitions, but to a miniſterial taking of felons as he was conſervator of the peace, for his *Turn* was kept but twice in the year, but the occaſions of taking felons were frequent.

And accordingly it was practiſed, *vide* 5 *H.* 7. 5. *a. in fine*, the ſheriff arreſted one ſuſpected of felony, and no queſtion of the lawfulneſs thereof.

[88] III. *Coroners:* Tho coroners had no power of taking inquiſitions of any felony but the death of a man, as hath been ſhewn; and therefore by the expreſs proviſion of the ſtatute of 4 *E.* 1. *De officio coronatoris* he may not only make proceſs but make hue and cry after them, yet by the ſtatute of *Weſtminſt.* 1. *cap.* 9. above-mentiond he is a conſervator of the peace in relation to all felonies, and can command them to be apprehended, tho he can take no inquiſition concerning any but the death of a man.

IV. For the office of *conſtable* it is of twofold extent. 1. Miniſterial and relative to the juſtices of peace, coroners, ſheriffs, &c. whoſe precepts he ought to execute, or in default thereof he may be indicted and fined. 2. Original or primitive, as he is a conſervator of the peace at common law.

By the original and inherent power in the conſtable he may for breach of the peace and ſome miſdemeanors, leſs than felony, impriſon a perſon.

If a man leaves an infant in the cold to the intent to deſtroy it, or charge the pariſh, the conſtable may take him and put him in the ſtocks. *M.* 34 & 35 *Eliz. B. R. Croke, n.* 1. *Beal* and *Charter, p.* 287.

So if a conſtable be aſſaulted by *A.* tho it be in his own caſe, he may impriſon the party and carry him to gaol; but for opprobrious words, or a general hindrance of him to ſummon the trained bands to attend the lord mayor of *London* upon his precept, he cannot juſtify the impriſoning of a perſon in the *Compter*, *T.* 31 *Eliz. Rot.* 1521. *Fulwood* and *Gaſcoign (c)*; but he muſt bring him to a juſtice of peace: *nota*, in the juſtification it was alſo adjuged, that he aſſaulted him: *ideo quære* of that judgment.

(c) *Savil. p.* 97.

And

And what may be done by a conſtable may be done by his deputy, for by the law a conſtable may make a deputy, and he is within the ſtatute of 7 *Jac. cap.* 5. to plead the general iſſue. *M.* 13 *Jac. B. R. Phelps* and *Winchcombe (d).*

If *A.* menace *B.* to kill him, upon complaint thereof to the conſtable he may arreſt him and put him into the ſtocks, till he find ſurety of the peace, 44 *E.* 3. *Barre* 202. but that is [89] intended, that he may detain him till he can conveniently bring him to a juſtice of peace and to avoid the preſent danger, for tho ſome of the old books ſeem to hold, that the conſtable may take ſureties of the peace and detain a perſon till he gives him ſureties, yet it cannot be by recognizance but by bond, and that for an affray or menace of breach of the peace done in his view. *H.* 37 *Eliz. B. R. Croke, n.* 25. *Sharrock* and *Hanmer (e).*

If information be given to a conſtable, that a man and woman are in incontinency together, he may take the neighbours and arreſt them, and commit them to priſon to find ſureties for their good behaviour, 1 *H.* 7. 6. *a.* there the cuſtom of *London* indeed is pleaded; but 13 *H.* 7. 10. *b.* adjudged, that it is a good juſtification for the conſtable or any in aſſiſtance to plead, that *A.* holds a meſſuage in the ſame vill, and ſhe kept perſons ſuſpected of common bawdry, and the plaintiff ſuſpiciouſly reſorted to that houſe with women of ill fame, and that he arreſted the plaintiff to find ſureties for the good behaviour.

The conſtable may arreſt ſuſpicious night walkers *(f)* by the ſtatute of 5 *E.* 3. *cap.* 14. and men that ride armed in fair or markets or elſewhere. *Stat.* 2 *E.* 3. *cap.* 3. *de Northampton.*

And it appears by the books before-mentioned, that in caſes of arreſts of this or the like nature, the conſtable may execute his office upon information and requeſt of others, that ſuſpect and charge the

(d) Moor p. 845.

(e) Cro. Eliz. p. 375.

(f) But then that ſuſpicion muſt not be a mere cauſeleſs ſuſpicion, but muſt be founded upon ſome probable reaſon; and ſo it was ruled in the caſe of the Queen and *Tooley, Mich.* 1709. for the murder of *Dent*, who was kild in aiding the conſtable, who had taken up a woman, that was walking the ſtreet upon ſuſpicion, as being a woman of ill fame. *C. J. Holt* deliverd the reſolution of the court, that it was not murder, and gave this for one reaſon, "That it was not lawful even for a legal "conſtable to take up a woman upon a "bare ſuſpicion only, having been guilty "of no breach of the peace nor any un-"lawful act: and as to the caſe in 13 *H.* 7. "10. the reaſon thereof was, becauſe it "was in the view of the conſtable, who "found her miſdoing; that of late, con-"ſtables made a practice of taking up "people only for walking the ſtreets, but "he knew not whence they had ſuch an "authority. *MS. Rep.*

offenders,

offenders, nay tho it be but with ſuſpicion thereof. 5 *E.* 3. *cap.* 14. 13 *H.* 7. 10. *b.* 44 *E.* 3. *Barre* 202.

But if there be an affray, tho to prevent it, or in the time of the affray the conſtable may upon information or complaint arreſt the offender, yet it is held, that if the affray be paſt, and no danger of death, the conſtable cannot arreſt the parties without a warrant from a juſtice of peace. 38 *E.* 3. *B. Faux Impriſonment* 6.

But the law ſeems contrary, for tho in that caſe he cannot take ſurety of the peace himſelf, yet upon a complaint to him he may arreſt the party to bring him before a juſtice to find ſurety of the peace, or for appearance. 44 *E.* 3. *Barre* 202. 35 *Eliz.* *Sharrock*'s caſe.

Now as touching the conſtable's power of arreſting *ex officio* in relation to felonies it may come under theſe conſiderations, 1. What his power is to arreſt when a felony is *certainly* committed. 2. What his power is to arreſt in caſes of *ſuſpicion* of felony. 3. What his power is in caſe of *danger* of felony, tho none be committed, as in caſe of affrays or dangerous wounding.

1. As to the firſt of theſe, where a felony is committed, it is of all hands agreed, that he may *ex officio* arreſt and impriſon the felon till he can conveniently be conveyed to a juſtice of peace or the common gaol.

And it will be all one, whether the felony were committed in the ſame vill, or in any other vill or county, if the felons be within the vill where he is conſtable.

And this appears clearly by the books of 2 *H.* 7. 15 *b.* 7 *E.* 4. 20. *a.* and divers others, and by the ſtatute of *Weſtm.* 1. *cap.* 9. 5 *E.* 3. *cap.* 14.

And in that caſe it is on all hands agreed.

1. That he may break open doors to take the felon, if the felon be in the houſe, and his entry denied after demand and notice that he is conſtable.

2. That if in ſuch an attempt of arreſt the conſtable or any that come in his aſſiſtance be kild after competent notice that he is conſtable, it is murder.

[91] 3. That if the felon reſiſt and cannot be taken, whether it be after the arreſt or before, the killing of the felon, who cannot be otherwiſe taken, is no felony.

And the reaſon of all this is, becauſe he is *ex officio* a conſervator of the peace, and is not only permitted but by law injoind to take a felon,

felon, and if he omits his duty herein, he is indictable and ſubject to a fine and impriſonment.

And it is not material, whether he ſaw the felony committed, or hath it only by complaint or information; for as well in one caſe as the other he is bound to apprehend the felon, and make ſearch after him within the limits of his juriſdiction, and to raiſe *hue* and *cry* upon him; and certainly what may be done upon *hue* and *cry* raiſed upon a felon may be done by that conſtable who upon the firſt complaint raiſeth it; and the law gives him protection in the execution of his office, and will never puniſh him in the neceſſary purſuit of what it injoins him.

And with this all the before cited books in the precedent chapter do agree; for I have before therein determind, that in this caſe a private perſon may kill a felon, who is really ſuch, if he cannot otherwiſe be taken; *vide ſupra*, *p.* 77.

2. I come to the *ſecond*, namely what if there be a felony done, (ſuppoſe a robbery upon *A.*) and *A.* ſuſpects *B.* upon probable grounds to be the felon, and acquaints the conſtable with it, and deſires his aid to apprehend him; in this caſe I ſay,

1. That the conſtable may apprehend *B.* upon this account, tho the ſuſpicion ariſe in *A.* at firſt; and with this agree the ſtatutes of 3 *E.* 1. *cap.* 9. and 5 *E.* 3. *cap.* 14. and the books of 2 *E.* 4. 9. *a.* 5 *Co. Rep.* 91. *b.* *Semain*'s caſe, *Dalt. cap.* 109. *p.* 292. *(g)*, 13 *E.* 4. 9. *a.* *accords* 2 *H.* 7. 15. *b.* tho *Brian* be to the contrary; but there are to be theſe circumſtances to accompany it, 1. *A.* the perſon ſuſpecting ought to be preſent, for the juſtification is, that he did aid *A.* in taking the party ſuſpected, 2 *H.* 7. 15. *b.* He ought to inquire and examine the circumſtances and cauſes of the ſuſpicion of *A.* which tho he cannot do it upon oath, yet ſuch an information may carry over the ſuſpicion even to the conſtable, whereby it may become his ſuſpicion as well as the ſuſpicion of *A.* [92] And if the conſtable ſhould not be allowd this latitude in caſes of this nature, many felons would eſcape, and the party arreſted hath no prejudice thereby, for the juſtice of the peace, to whom in ſuch caſes he is properly to be brought, may conſider the circumſtances, and poſſibly in ſome caſes diſcharge or bail him, and upon his trial, if innocent, he will be diſcharged. 3. But there muſt be a felony in fact

(g) *New Edit. cap.* 162. *p.* 535.

done

done, and the conſtable muſt be aſcertained of *that*, and aver it in his plea, and it is iſſuable.

2. Conſequently, if the conſtable upon ſuch an arreſt or attempt thereof be kild, it is murder as well as in the former caſe.

3. That in ſuch caſe, if the ſuppoſed offender fly and take houſe, and the door will not be opened upon demand of the conſtable and notification of his buſineſs, the conſtable may break open the door, tho he have no warrant. 13 *E.* 4. 9. *a.* for it is a proceeding for the king by perſons by law authorized, and therefore there is virtually a *non omittas* in the actings of their authority.

And the reaſon of the difference between private perſons arreſting upon ſuſpicion and conſtables is, 1. Becauſe that in the former caſe it is but a thing permitted to private perſons to arreſt for ſuſpicion, and they are not puniſhable if they omit it, and therefore they cannot break open doors; but in caſe of a conſtable he is puniſhable if he omits it upon complaint. 2. Becauſe it would be a great inconvenience if every private man upon pretence of ſuſpicion ſhould break open houſes, for they may not be of known value or reſponſible; but a conſtable is an officer known within the vill, and his authority known, and is preſumed of ſufficiency, for he is choſen by the leet, like a bailiff *jurus & conus*, who need not ſhew his warrant (*).

Again it ſeems to me, that if a perſon thus charged with ſuſpicion of felony upon juſt grounds of ſuſpicion, and where a felony is actu-
[93] ally committed, tho he be innocent, yet if he reſiſt the officer after notice that he is the officer, and aſſault him, if the officer kill him, it is no murder.

But it may be more queſtionable, whether if he fly and cannot be apprehended, the officer may kill him, where he is ſuſpected and innocent, if he cannot be otherwiſe taken, as he may a felon, as before is ſhewn, *p.* 77. but it ſeems he may, and it is no felony no more than in the former caſe, for theſe reaſons, 1. Becauſe the conſtable is obliged to do his office in caſe of a probable ſuſpicion, as well as in caſe of an actual felony. 2. Becauſe he cannot judge, whether the party be guilty or not, till he comes to his trial, which cannot be till he be apprehended. 3. Becauſe the party draws upon himſelf this inconvenience, and makes himſelf ſuſpected by his very flight from the known officer.

(*) *Vide Part* I. *p.* 161.

And

And this is the reaſon why, tho a man be innocent of a felony committed, yet if he fled for it, and *that* be preſented by the coroner, or found by the jury *that* acquits him of the felony, yet he forfeits his goods, becauſe it was his own fault that he did not *ſtare juri*, and brought upon himſelf the juſt cauſe of ſuſpicion, and put the country to trouble and hazard in purſuing him.

And yet it is true, that if the felon were not once in the hands of an officer that had warrant to arreſt, as if he be in the houſe, and fly out at a back-door before the officer ſeizeth him, this is not an eſcape in the officer, 27 *Aſſiz.* 9. But on the other ſide it may be ſaid, that it is neverthleſs an eſcape in the townſhip, for which they ſhall be amerced, tho the perſon were never actually taken; *quod vide ſupra, cap.* 10.

And therefore it is at the peril of the whole vill, if they take not a felon (*), and when he is upon probable cauſe ſuſpected, he is preſumed to be ſuch, till the contrary appear upon his trial.

And therefore, as before is ſaid, a juſtice of peace cannot diſcharge a perſon brought before him but for ſuſpicion of felony, in caſe a felony were committed, but muſt either bail or commit him.

And upon the reaſon before given it ſeems, that if a perſon be charged to the conſtable for felony, or ſuſpicion of [94] felony in the county of *A.* and the conſtable charge him in the king's name to yield himſelf, and he either before or after the arreſt purſue him into another vill, nay into another county, the conſtable hath the ſame privilege and protection upon his purſuit and arreſt, as if he were taken in the county of *A.* tho yet he muſt bring him before the juſtice of that county where he was taken: *vide Crompton de Pace, p.* 172, 173. *Dalt. p.* 340. *(h).*

But for this latter caſe I take the law to be all one in caſe of a conſtable having a warrant to arreſt a felon, or not having one, but doing it by his own intrinſic power *virtute officii*, namely, that if he hath or hath not a warrant from a juſtice of peace to arreſt a felon, if the felon fly into another county before arreſt, he is to be brought before a juſtice of that county, or to the gaol of that county, where he is arreſted; but if he were once arreſted and eſcape, and upon freſh ſuit he is taken by the conſtable in another county, yet he may

(*) This holds only as to felony touching the death of a man, but not in caſe of other felony, as theft, &c. *vide ſupra, p.* 73.

(h) New Edit. p. 534.

be brought back to the juſtice, or gaol of that county where he was firſt arreſted (*); for in that caſe in ſuppoſition of law he is always in cuſtody by force and authority of the firſt arreſt, as well where the arreſt was *virtute officii*, as where done by a warrant. *Vide* 2 *E.* 4. 6. *b.* 13 *E.* 4. 8. *b.*

And thus far touching the ſecond caſe.

3. The *third* caſe is, where a felony is not yet committed, but in danger to be committed.

If *A.* hath wounded *B.* ſo that he is in danger of death, and *A.* flies and takes his houſe, and ſhuts the doors, and will not open them, the conſtable of the vill where it is done, or upon hue and cry, may break the doors of the houſe to take him, if upon demand he will not yield himſelf to the conſtable. 7 *E.* 3. 16. *b.* *Barre* 291.

And in that caſe, if the conſtable be kild, it is murder; if he kill *A.* if he cannot be otherwiſe taken, it is no felony, but excuſable and juſtifiable by the neceſſity cauſed by the obſtinacy and default of *A.*

[95] If there be an affray in the houſe, where the doors are ſhut, whereby there is likely to be manſlaughter or blood-ſhed committed, the conſtable of the vill having notice thereof, and demanding entrance, if they *within* refuſe to do it, but continue the affray, the conſtable may break open the doors to keep the peace and prevent the danger.

Nay yet farther, if there be diſorderly drinking or noiſe in an houſe at an unſeaſonable time of night, eſpecially in inns, taverns, or alehouſes, the conſtable or his watch demanding entrance, and being refuſed, may break open the doors to ſee and ſuppreſs the diſorder; and this is conſtantly uſed in *London* and *Middleſex*.

I come now in the *laſt* place to conſider what the conſtable is to do with his priſoner that he hath thus arreſted for felony, or other cauſes above-mentiond.

In caſe of a ſudden affray through paſſion or exceſs of drink, he may put the perſons in the ſtocks, or in a priſon, if there be one in the vill, till the heat of their paſſion or intemperance is over, tho he delivers them afterwards, or till he can bring them before a juſtice of peace.

If an offenſe be committed, for which the conſtable may arreſt, he may convey them to the ſheriff, or his gaoler of the county; and

(*) *Vide Part* I. *p.* 580.

if

if it be within a franchiſe, he may deliver them to the gaol of the franchiſe, and they are bound to receive them without taking any fine for the ſame by the ſtatute of 4 *E.* 3. *cap.* 10. *vide* 5 *H.* 4. *cap.* 10. 23 *H.* 8. *cap.* 2. But the ſafeſt and beſt way in all caſes, is to bring them to a juſtice of peace, and by them the priſoner may be bailed or committed, as the caſe ſhall require; but till they are bailed or diſcharged, or the ſheriff or gaoler hath received them, they are ſtill under the charge of the conſtable that took them. 10 *H.* 4. 7. *a. Eſcape* 6. Till the conſtable can conveniently convey the parties arreſted to a juſtice of peace, or the common gaol, as when the arreſt is in or near night, he may detain the party in the ſtocks; or if there be no ſtocks in that vill, he may bring them to the ſtocks of the next adjacent vill.

And if the perſon be of quality or ſick, the conſtable may [keep him in an houſe *(i)*] for a day and a night at leaſt, [96] and in ſome caſes of neceſſity for a longer time, till he can with ſafety and conveniency convey him to a juſtice of peace, or the common gaol. 20 *E.* 4. 6. *b.* 22 *E.* 4. 35. *b. Dalt. p.* 340.

The charges of ſending malefactors to gaol by the common law, is to be borne by the vill where they are apprehended. 3 *E.* 3. *Coron.* 328. 4 *E.* 3. *cap.* 10.

But now by the ſtatute of 3 *Jac. cap.* 10. the charge is to be borne by the priſoner, if he hath wherewith, the ſame to be levied by warrant of the juſtices of peace; and if he hath not wherewith, then the charge to be borne by the pariſh, townſhip, or tithing, where the offender is apprehended, by a tax or rate to be made, as by the ſaid act is preſcribed.

And what I have herein ſaid touching the conſtable is applicable to a tithing-man, headborough, burtholder, for their authority is much the ſame.

But the conſtable of the hundred is a diſtinct officer, and introduced upon the ſtatute of *Winton*, *vide H.* 37 *Eliz. B. R. Croke*, *n.* 25. *Sharrock* and *Hanmer*; yet he ſeems to be a conſervator of the peace.

V. *Watchmen:* Watchers are of three kinds, 1. That which is appointed by the ſtatute of *Winton*, *cap.* 4. which is that from *Aſcenſion-day* until *Michaelmas*, watches ſhall be kept in all towns from

(i) Theſe words are not in the *MS.* but they or others to the like effect are manifeſtly wanted to ſupply the ſenſe.

ſun-ſetting to ſun-riſing in boroughs, &c. by twelve, in other towns by ſix or four, according to the number of the inhabitants: this watch is to be ſet by the conſtable, and the neglect thereof puniſhable by 5 *H.* 4. *cap.* 3. Their power is to arreſt ſuch as paſs by until the morning, and if no ſuſpicion, they are then to be delivered, and if ſuſpicion be touching them, they ſhall be delivered to the ſheriff, *viz.* to the common gaol, there to remain until they be in due manner delivered; and if they will not obey the arreſt, hue and cry ſhall be levied upon them; but this watch extends only between *Aſcenſion day* and *Michaelmas.*

[97]

2. But there is another watch that may be kept by the conſtable *ex officio*, which may extend to other times, becauſe there be other things under his charge, as a conſervator of the peace, as for the purpoſe to raiſe or purſue hue and cry upon robberies committed by the ſtatute of *Winton, cap.* 1. to ſearch for lodgers in ſuburbs of cities, that are ſuſpicious perſons, which is to be done every week, or at leaſt once in fifteen days by the ſame ſtatute, *cap.* 4. for ſuch as ride or go armed by the ſtatute of 2 *E.* 3. *cap.* 3. for night-walkers and perſons ſuſpicious either by night or day by the ſtatute of 5 *E.* 3. *cap.* 14.

And altho a conſtable is not bound to any preciſe time for this kind of watch, nor puniſhable, if he omit it barely for the omiſſion, if he be ready upon occaſion to do his office, when required in theſe caſes, yet it is in his power to hold ſuch watches, as often as he pleaſes, and it is convenient and juſtifiable, and herein the watchmen are the miniſters and aſſiſtants of the conſtable, and are under the ſame protection with him, and may act as he doth; and regularly he ought to be in company with them in their walk and watch.

3. There is yet a third kind of watch, which is by authority of the juſtices of peace, which may be held at other times than the ſtatute of *Winton* appoints, and the watch thus appointed hath the ſame power as either of the former; and this ſeems to be within the power of any one juſtice of peace by the firſt *Aſſignavimus* in his commiſſion; *vide Lamb. Juſtic. Lib.* I. *cap.* 20. *p.* 185. *Dalt. cap.* 60. *p.* 142. *(k)*, and *cap.* 109. *p.* 292. *(l)*; but the ſafer way and more uſual is by order of the ſeſſions of the peace or of the court of king's bench, which hath the higheſt ordinary authority in matters of the peace and preſervation thereof.

(k) New Edit. cap. 104. *p.* 352. *(l) New Edit. cap.* 109. *p.* 536.

Now

Now a watchman hath a double protection of the law, *viz.* 1. As an aſſiſtant to the conſtable, when the conſtable is preſent or in the watch, for ſo every man, who is aſſiſting to the conſtable in the execution of his office, hath the ſame protection, that the law gives the conſtable. 2. Purely as a watchman ſet by [98] order of law; and the law takes notice of his authority *ſub eo nomine*, and therefore killing of a watchman in execution of his office is murder. *Co. P. C. cap.* 7. *p.* 52. 9 *Co. Rep.* 66. *a. Mackally's* caſe.

And ſuch a watchman may apprehend night-walkers and commit them to cuſtody till the morning, and alſo felons and perſons ſuſpected of felony.

And thus far of arreſts *virtute officii*.

See Burn. Tit. Arreſt. per tot. Index to 2 Hawk. P. C. Tit. Arreſt. Foſter 136, 319, 320 & 4. Blackſ. Com. ch. 21. Of arreſts; pa. 289, &c. See Burn. Tit. Conſtable. Burn. tit. Watch.

CHAP. XII.

Of arreſts of felons *upon* hue *and* cry *raiſed*.

HUE and *cry* is the old common law proceſs after felons and ſuch as have dangerouſly wounded any perſon: And this hath received great countenance and authority by ſeveral acts of parliament.

By the ſtatute of *Weſtm.* 1. *cap.* 9. *(a)*, it is enacted, "That all "be ready and apparelled at the ſummons of the ſheriff & *a cry de* "*pays* to purſue and arreſt felons as well within franchiſes as with- "out; and if they do it not and be thereof attaint, *le roy prendra a* "*eux grevement*, they are to be indicted and fined for the neglect.

By the ſtatute of 4 *E.* 1. *De officio coronatoris* "*Hue* and *cry* ſhall "be levied for all murders, burglaries, men-ſlain, or in peril to be "ſlain, as other-where is uſed in *England*, and all ſhall follow the "*hue* and ſteps as near as they can; and he that doth not, and is "convict thereof, ſhall be attached to be before the juſtices in *eyre*."

By the ſtatute of *Winton*, *cap.* 1, "From henceforth every coun- "try ſhall be ſo well kept, that immediately upon robberies and

(a) 2 *Co. Inſtit. p.* 171.

" felonies committed freſh ſuit ſhall be made from town to town, " and from country to country:" and *cap.* 4. " If any will not " obey the arreſt of the town, where night-walkers paſs, they " ſhall levy *hue* and *cry* upon them; and ſuch as keep the town, " (*viz.* the bailiff or conſtable), ſhall follow with *hue* and *cry* with " all the town and the towns near; and ſo *hue* and *cry* ſhall be made " from town to town, until they are taken and deliverd to the ſhe- " riff; and for arreſtments of ſuch ſtrangers none ſhall be pu- " niſhed."

And this is in truth but the antient law; thus it appears by *Bracton, Lib.* III. *cap.* 1. where he mentions a proviſion *per dominum regem & ejus conſilium*, (which muſt be intended an antient act of parliament,) *quòd omnes tàm milites quàm alii, qui ſunt quindecim annorum & ampliùs, jurare debent, quòd utlegatos, murdratores, robbatores, & burglatores non receptabunt, nec iis conſentirent, nec eorum receptatoribus, &, ſi quos tales noverint, eos attachiari faciem, & hoc vice-comiti & bellivis ſuis monſtrabunt, & ſi hueſium vel clamorem de talibus audiverint, ſtatim audito clamore ſequentur cum familiâ & hominibus de terrâ ſuâ* (*).

And it is one of the articles of inquiry in the leet in the ſtatute *de viſu franci plegii, de hues levies & nient purſues*, and among the *capitula Itineris de hueſio levato & non ſecuto: vide Coke ſuper ſtat. Weſtm.* 1. *cap.* 9. 2 *Inſtit. p.* 172.

And altho it is a good courſe to have a juſtice of peace to direct his warrant for raiſing *hue* and *cry* to prevent cauſeleſs *hues* and *cries*, yet it is neither of abſolute neceſſity nor ſometimes convenient; for the felons may eſcape before the juſtice can be found, and *hue* and *cry* was part of the law before the ſtatute of 1 *E.* 3. *cap.* 16. which firſt inſtituted juſtices of peace.

And altho alſo it is ſpecially incumbent upon conſtables to purſue *hue* and *cry*, when called upon, and they are ſeverally puniſhed, if they neglect it (*b*), and it prevents many inconveniencies, if they be there; for it gives a greater authority to their purſuit, and [100] enables the purſuants in his aſſiſtance to plead the general

(*) *Vide* Part I. *p.* 23 & 24. *in notis.*

(*b*) By 8 Geo. 2. *cap.* 16. " If any " conſtable, headborough, &c. within the " hundred wherein any robbery ſhall hap- " pen, ſhall refuſe or neglect to make " *hue* and *cry* after the felons with the " utmoſt expedition, as ſoon as he ſhall " receive notice thereof, he ſhall, for " every ſuch refuſal or neglect, forfeit " five pounds, one half to the king, and " the other half to ſuch perſon as ſhall " ſue for the ſame."

iſſue

iſſue upon the ſtatutes of 7 & 21 *Jac.* without being driven to ſpecial pleading; and therefore to prevent inconveniencies that may happen by unrulineſs, it is moſt adviſeable, that the conſtable be called to this action.

Yet upon a robbery or other felony committed, *hue* and *cry* may be raiſed by the country in the abſence of the conſtable, it is therefore called *Cry de pais.*

Neither is there any inconvenience conſiderable in it; for if *hue* and *cry* be raiſed without cauſe, they that raiſe it are puniſhable by fine and impriſonment. 2 *Co. Inſtit. p.* 173.

And accordingly it was agreed by the two chief juſtices and three other judges, upon the trial of *Packhurſt*, *Jackſon*, and others, who were all convicted of murder, and executed, for killing two of the countrymen that followed them, being highway robbers. *Lent* vacation, *anno Car.* 2. 26.

In this matter of *hue* and *cry* theſe things are conſiderable, *viz.* 1. By whom it is to be levied. 2. How it is to be levied. 3. In what manner to be purſued. 4. What may be done by them that purſue it. 5. How puniſhed, if omitted or neglected.

I. *Hue* and *Cry* may be raiſed as well by an officer of juſtice, as by the precept of a juſtice of peace upon information of a felony.

Or it may be raiſed by any private perſon that is robbed, or knows of any felony.

II. Touching the manner of it: It is diverſe according to a variety of circumſtances. 1. The party that levies it ought to come to the conſtable of the vill, and give him notice of a felony committed, and give him ſuch reaſonable aſſurance thereof as the nature of the caſe will bear. 2. If he knows the name of him that did it, he muſt tell the conſtable the ſame. 3. If he knows it not, but can deſcribe him, he muſt deſcribe his perſon, or his habit, or his horſe, or ſuch circumſtances that he knows, which may conduce to his diſcovery. 4. If the thing be done in the night, ſo that he knows none of theſe circumſtances, he muſt mention the number of the perſons, or the way they took. 5. If none of all theſe can be diſcoverd, as where a robbery, or burglary, or felony is committed in the [101] night, yet they are to acquaint the conſtable with the fact, and deſire him to ſearch in his town for ſuſpected perſons, and to make *hue* and *cry* after ſuch as may be probably ſuſpected as being perſons vagrant

in the ſame night, for many circumſtances may *ex poſt facto* be uſeful for diſcovering a malefactor, which cannot be at firſt found *(c)*.

III. In what manner it is to be purſued. 1. The conſtable is to make ſearch in his own vill, 2 *E.* 4. 8 & 9. 2. He is to raiſe all the neighbouring vills next about, *Crompt. de Pace, f.* 178. *b.* 3. It is to be purſued with horſe and foot: *vide* 27 *Eliz. cap.* 13. *Dalt. cap.* 28. *p.* 75. *(d)*, *per direction de Hyde*, chief juſtice.

IV. What may be done in purſuance of a *hue* and *cry* levied, and therein I think as followeth:

1. That in caſe of *hue* and *cry* once raiſed and levied upon ſuppoſal of a felony committed, tho in truth there was no felony committed, yet thoſe that purſue *hue* and *cry* may arreſt and proceed, as if ſo be a felony had been really committed.

And therefore the juſtification of an impriſonment by a perſon upon ſuſpicion, and by a perſon, eſpecially a conſtable, upon *hue* and *cry* levied do extremely differ; for in the former, there muſt be a felony averred to be done, and it is iſſuable; but in the latter, *viz.* upon *hue* and *cry* it need not be averred, but the *hue* and *cry* levied upon information of a felony is ſufficient, tho perchance the information were falſe; and therefore I do not find any averment of a felony committed in caſe of a juſtification of an im- [102] priſonment upon *hue* and *cry*. 5 *H.* 7. 5. *a.* 21 *H.* 7. 28. *a. per Rede*, 2 *E.* 4. 8 & 9

And the reaſons hereof are theſe. 1. Becauſe the conſtable cannot examine the truth or falſhood of the ſuggeſtion of him that firſt levied it, for he cannot adminiſter him an oath, and if he ſhould forbear his purſuit of the *hue* and *cry*, till it be examined by a juſtice of peace, the felon might eſcape, and the purſuit would be loſt and fruitleſs. 2. Becauſe the conſtable is by the acts of parliament

(c) By 27 *Eliz. cap.* 13. To the levying of *hue* and *cry*, ſo as to charge the hundred for any robbery it is requiſite, "That the party robbed do, with all convenient ſpeed, give notice thereof to "the inhabitants of ſome town, village, or "hamlet, near the place where the robbery was committed;" And by 8 *Geo.* 2. *cap.* 16. it is further required, "That the party robbed do, with all convenient ſpeed, give notice thereof to "ſome conſtable, headborough, &c. of "ſome town, &c. near the place of the "robbery, or leave notice in writing of "ſuch robbery at the dwelling-houſe of "ſuch conſtable, &c. deſcribing, as far "as the nature and circumſtances of the "caſe will admit, the felon or felons, and "the time and place of the robbery; and "alſo within twenty days next after the "robbery committed, cauſe public notice "to be given thereof in the *London Gazette*, therein likewiſe deſcribing the "felon or felons, and the time and place "of ſuch robbery, together with the "goods whereof he was robbed." See 2 WILSON 112, 113.

(d) New Edit. cap. 54. *p.* 169.

before-

before-mentiond compellible to purſue *hue* and *cry*, and he is puniſhable, and ſo are thoſe of the vill, if they do it not, as appears by the acts of parliament above-mentiond. 3. Becauſe he that firſt raiſeth *hue* and *cry*, where no felony is committed, *viz.* the perſon that giveth the falſe information, is ſeverely puniſhable by fine and impriſonment, if the information be falſe. 21 *H.* 7. 28. *a.* 29 *E.* 3. 39. *a. b.* 2 *Co. Inſtit. p.* 173.

And therefore if he raiſe a *hue* and *cry* upon a perſon that is innocent, yet they that purſue the *hue* and *cry*, may juſtify the impriſonment of that innocent perſon, and the raiſer is puniſhable; and by the ſame reaſon, if he give notice of a felony committed, when there was in truth none.

2. If *hue* and *cry* be raiſed againſt a perſon certain for felony, tho poſſibly he is innocent, yet the conſtables, and thoſe that follow the *hue* and *cry*, may arreſt and impriſon him in the common gaol, or carry him to a juſtice of peace.

3. If the perſon purſued by *hue* and *cry* be in a houſe, and the doors are ſhut, and refuſed to be opened, upon demand of the conſtable, and notification of his buſineſs, he may break open the doors; and this he may do in any caſe where he may arreſt, tho it be only a ſuſpicion of felony, for it is for the king and commonwealth, and therefore a virtual *non omittas* is in the caſe: *vide* 5 *Co. Rep.* 92. *b. Semain*'s caſe. And the ſame law is upon a dangerous wound given, and a *hue* and *cry* levied upon the offender. 7 *E.* 3. 16. *b. Barre* 291.

And it ſeems in this caſe, that if he cannot be otherwiſe taken, he may be kild, and the neceſſity excuſeth the conſtable: *vide Part* I. *cap.* 9. *p.* 53.

4. Upon *hue* and *cry* levied againſt any perſon, or where any *hue* and *cry* comes to a conſtable, whether the perſon be [103] certain or uncertain, the conſtable may ſearch in ſuſpected places within his vill for the apprehending of the felons. *Dalt. cap.* 28. *p.* 75. *(e)*, *Crompt. de Pace*, *f.* 178. *b.* 2 *E.* 4. 8. *b.*

But tho he may ſearch ſuſpected places or houſes, yet his entry muſt be *per oſtia aperta*, for he cannot break open doors barely to ſearch, unleſs the perſon againſt whom the *hue* and *cry* is levied be there, and then it is true he may; therefore in caſe of ſuch a ſearch,

(e) New Edit. cap. 54. *p.* 169.

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the breaking open the door is at his peril, *viz.* juſtifiable, if he be there; not juſtifiable, if he be not there; but it muſt be always remembered, that in caſe of breaking open a door, there muſt be firſt a notice given to them within of his buſineſs, and a demand of entrance, and a refuſal before doors can be broken.

5. If the *hue* and *cry* be not againſt a perſon certain, but by deſcription of his ſtature, perſon, clothes, horſe, &c. the *hue* and *cry* doth juſtify the conſtable, or other perſon following it, in apprehending the perſon ſo deſcribed, whether innocent or guilty, for that is his warrant, it is a kind of proceſs, that the law allows (not uſual in other caſes), *viz.* to arreſt a perſon by deſcription.

6. But if the *hue* and *cry* be upon a robbery, burglary, manſlaughter, or other felony committed, but the perſon that did the fact is neither known nor deſcribible by perſon, clothes, or the like, yet ſuch a *hue* and *cry* is good, as hath been ſaid, and muſt be purſued, tho no perſon certain be named or deſcribed.

And therefore in this caſe all that can be done is for thoſe that purſue the *hue* and *cry*, to take ſuch perſons as they have probable cauſe to ſuſpect; as for inſtance, ſuch perſons as are vagrants, that cannot give an account where they live, whence they are, or ſuch ſuſpicious perſons as come late into their inn or lodgings, and give no reaſonable account where they had been, and the like; *vide* 2 *E.* 4. 8. *b.*

[104] And here the juſtification of the impriſonment is mixed partly upon the *hue* and *cry*, and partly upon their own ſuſpicion; and therefore, 1. In reſpect that it is upon *hue* and *cry* there needs no averment that the felony was done, yet it muſt be averred, that an information was given, that the felony was done, if the arreſt be by that conſtable that firſt received the information, and ſo raiſed the *hue* and *cry*; or if the arreſt were made by that conſtable, or thoſe vills to whom the *hue* and *cry* came at the ſecond hand, it muſt be averred that ſuch a *hue* and *cry* came to them purporting ſuch a felony to be done; but, 2. Alſo in as much as the *hue* and *cry* neither names nor deſcribes the perſon of the felon, but only the felony committed, and therefore the arreſt of this or that particular perſon, and ſo applied, is left to the ſuſpicion and diſcretion of the conſtable, or the people of the ſecond or third vill, he that arreſts any perſon upon ſuch general *hue* and *cry* muſt aver that he ſuſpected, and ſhew a reaſonable cauſe of ſuſpicion.

But

But now by the ſtatute of 7 *Jac. cap.* 5. the conſtable or any that come in his aſſiſtance, even in this caſe of *hue* and *cry*, may plead the general iſſue, and give the whole matter of the juſtification in evidence for the purſuit of *hue* and *cry*, tho performed by others as well as the conſtable, is principally the act of the conſtable of the vill, and the others are but as his deputies or aſſiſtants within the precincts of their conſtable-wick.

V. For the laſt matter, how the neglect of the purſuit of *hue* and *cry* is to be puniſhed, it hath been before declared upon the ſtatutes of 3 *E.* 1. *cap.* 9. 4 *E.* 1. and 13 *E.* 1. of *Winton*, they are to be indicted, fined and impriſoned.

Burn. tit. Hue and Cry. Index to 2 Hawk. P. C. tit. Hue and Cry. 4 Blackſ. Com. ch. 21. p. 293.

CHAP. XIII. [105]

Arreſts of felons virtute præcepti, *or of* warrants.

I COME now to conſider of arreſts of felons or perſons ſuſpected of felony by warrant or precept, namely not of precepts that iſſue upon matter of record, as upon appeals or indictments, which regularly are to be by writ, but ſuch warrants as are preparatory to it, or for conſervation of the peace.

And herein regularly all courts and perſons, that have judicial power by the common law, or by act of parliament for the conſervation of the peace, have power to grant warrants for arreſting of felons; but ſuch as are ſimply miniſterial and have no juriſdiction, as conſtables, cannot iſſue warrants for that purpoſe, but muſt do their office either alone, or with others called to their aſſiſtance.

The court of king's bench hath not only a power to iſſue writs upon indictments or appeals before them, but have alſo power by order to command the ſheriff of the county where they ſit, or the marſhal of the court, to apprehend felons or diſturbers of the peace, and bring them before the court; and this is warrantable by the cuſtom of the court, which is part of the law of the land.

Yea I have known by great advice, that where there hath been information upon oath of a breach of the peace, and a deſign by perſons

perſons whoſe names could not be known, to commit a riot or breach of the peace, an order hath been made by the court to the ſheriff to bring before them ſuch perſons as ſhould be probably ſuſpected to be parties therein, and to bring them into the court, *M.* 23 *Car.* 2. in *Storie's* caſe, for attempting to take away the daughter of Mrs. *Gilburn* with maſks and vizards.

See before *cap.* 1. concerning the king's bench.

[106] A commiſſion iſſues out of the *chancery* under the great ſeal to take perſons that were notoriouſly famed of felony or treſpaſs, tho they were not indicted, and by virtue hereof the commiſſioners iſſue a precept to *B.* to take *J. S.* that had dangerouſly wounded another; this was admitted a good juſtification in the officer, tho the commiſſion itſelf was againſt law, 24 *E.* 3. 9. *B. Faux Impriſonment* 9. *Vide ſimile* 42 *Aſſiz.* 5. where a commiſſion iſſuing out of *chancery* to take *J. S.* and his goods, before he was indicted, is ruled to be againſt law.

And therefore I would never adviſe thoſe general proclamations, that have ſometimes iſſued, to take certain perſons notoriouſly ſuſpected of felony but not indicted.

It is true, that ſuch a proclamation may be a means to give notice of felons, but ſo it may perchance include true men; and therefore what by law a conſtable, ſheriff, officer, or private perſons may do in arreſting of felons or ſuſpected perſons without ſuch a proclamation may be juſtifiable, but not by virtue of the proclamation, neither can any juſtification be made by virtue of it; and therefore ſuch proclamations againſt perſons not indicted are againſt law, and may bring great inconveniencies, 1. By leading the country into an error. 2. By the example itſelf, which may be of ill conſequence to honeſt men, as well as of uſe to apprehend felons.

27 *Aſſiz.* 35. A man was indicted of felony before juſtices of *oyer* and *terminer:* It is admitted, that the juſtices may not only award proceſs of outlawry thereupon, but may alſo iſſue a commiſſion (which is no other than a warrant under their hands and ſeals) to take the party, and that by virtue of ſuch a warrant or commiſſion they may break open doors, but they muſt ſhew their commiſſion, if demanded.

By the common law the ſheriff of the county might give out a warrant for the apprehending a felon before indictment; and this is farther confirmed by the ſtatute of 3 *E.* 1. *cap.* 9. *au commandment,*

& a

& a les ſummons de viſcount & au cry de pays muſt be underſtood disjunctively, *(or at the cry of the country)* for the ſheriff had juriſdiction at the common law to take indictments of old felonies in his *Turn*; and ſo he hath ſtill, tho he is not now to make proceſs upon them by the ſtatute of 1 *E.* 4. *cap.* 2. [107]

The coroners have alſo power to attach manſlayers by their warrants after inquiſition, whereby they are found guilty, but that ſeems not to be all their power; but they may make out warrants for apprehending thoſe perſons that are not, or cannot be preſented before them, as thoſe that were preſent and not guilty; nay alſo of burglars and robbers, and yet they cannot take an inquiſition touching them; this appears evidently by the ſtatutes of 3 *E.* 1. *cap.* 9. and 4 *E.* 1. *Officium coronatoris.* And with this agrees the common uſage at this day for the coroners to take manſlayers before their inquiſition be taken, for many times the inqueſt is long in their inquiry, and the offender may eſcape, if he ſtay till the inquiſition deliverd up.

But becauſe at this day the greateſt part of the buſineſs of this nature is diſpatched by juſtices of the peace, I ſhall be more large touching their warrants, wherein nevertheleſs much of what is ſaid therein will be applicable to the warrants that iſſue in like caſes by other perſons.

And therein I ſhall principally conſider theſe particulars, 1. When and in what caſes they may iſſue their warrants for the apprehending of felons. 2. To whom. 3. How and in what manner ſuch precept or warrant is to iſſue. 4. What may be done by the officer in purſuance thereof.

I. As touching the firſt, in what caſes juſtices of peace may make warrants for the taking of felons or perſons ſuſpect of felony.

My lord *Coke* in his juriſdiction of courts, *cap.* 31. *p.* 176, 177. hath deliverd certain tenets, which, if they ſhould hold to be law, would much abridge the power of juſtices of peace, and condemn the conſtant and uſual practice, and give a looſe to felons to eſcape unpuniſhed in moſt caſes (*), *viz.* 1. That a juſtice of peace cannot upon complaint iſſue a warrant to apprehend a felon before indictment, grounding himſelf upon the haſty opinion of *Fitzherbert* and *Brudnell*, 14 *H.* 8. 16. *a.* who yet hold the officer excuſed, that makes the arreſt upon that warrant. 2. That admit he may

(*) *Vide Part* 1. *p.* 575 & *ſupra p.* 79.

arreſt

arreſt, yet he cannot break open a houſe to take the felon by virtue of that warrant. 3. That admit he may arreſt by that warrant, yet he cannot iſſue a warrant in caſe only of ſuſpicion. 4. That admit he may, yet no houſe can be broken by virtue of ſuch warrant.

Touching the *ſecond* and *fourth* matter I ſhall conſider them, when I come to the buſineſs of the officer's power in purſuance of a juſtice's warrant; but touching the power of iſſuing this warrant by the juſtices of peace, I ſhall now conſider it: And therein I ſay as followeth.

1. That a juſtice of peace hath power to iſſue a warrant to apprehend a perſon accuſed of felony, tho not yet indicted.

That, upon which the doubt muſt ariſe to thoſe that made a doubt of it, muſt certainly be the ſtatutes of *Magna Charta, cap.* 29. *Nullus liber homo impriſonetur &c. niſi per legale judicium parium ſuorum vel per legem terræ.* 25 *E.* 3. *cap.* 4. "None ſhall be taken "upon ſuggeſtion made to the king or his council, unleſs it be by "preſentment or indictment, *&c.* or by writ original at the com-"mon law." 28 *E.* 3. *cap.* 3. "No man ſhall be taken, or im-"priſoned, or diſinherited, or put to death without being brought to "anſwer by due proceſs of law." 42 *E.* 3. *cap.* 3. "Whereas "upon falſe accuſations people have been brought before the king "and council, it is enacted, that no man ſhall be put to anſwer "without preſentment before juſtices or matter of record, or by due "proceſs and writ original according to the old law of the land.

Now all the weight of the queſtion upon theſe ſtatutes is to ſee what the law of the land is; for if theſe preparatory arreſts of felons be not againſt the law of the land, they are not reſtrained by theſe ſtatutes. Certainly by the law of the land, if a felony were committed, or but ſuſpected to be committed, a man might be arreſted by the party that knows, or upon probable grounds ſuſpects him to be the felon; or by a conſtable upon complaint, or upon *hue* and *cry*, and he might be carried to priſon, and there detained till deliverd by due courſe of law; and yet this perſon ſo arreſted not all this while indicted: *vide ſtatutes* 3 *E.* 1. *cap.* 9. 4 *E.* 3. *cap.* 10. and 5 *E.* 3. *cap.* 14. And all this was in order to preſerve the peace of the kingdom, and to ſuppreſs felons.

[109]

But this being not found effectual enough, by the ſtatute of 1 *E.* 3. *cap.* 16. for the better keeping and maintaining of the peace commiſſions

miſſions are to iſſue for the ſame in the ſeveral counties; this was their primitive inſtitution. Their power was enlarged by the ſtatute of 18 *E.* 3. *cap.* 2. to hear and determine felonies and treſpaſſes: and by the ſtatute of 34 *E.* 3. *cap.* 1. their power is farther enlarged, and particularly their taking as well perſons ſuſpected as indicted of felonies mentioned in that act is required, which, tho perchance it refer only to thoſe that have been robbers and gone beyond the ſea and ſince returned, yet it is a pattern for others.

Now by theſe ſtatutes ſurely as much power is intended to be tranſlated to the juſtices of peace in order to the preſervation thereof, as was in a conſtable or private perſon, for the juſtices of the peace are conſervators of the peace and more.

And let a man look upon all the acts of parliament, that have been down to this day, he ſhall find that the power of juſtices of peace to convene and commit felons before indictment is allowed. 4 *E.* 3. *cap.* 2. Sheriffs ſhall not let to mainpriſe ſuch as be indicted or taken by juſtices of peace, unleſs mainpernable by law, 1 *R.* 3. *cap.* 3. and 3 *H.* 7. *cap.* 3. concerning bailing of priſoners committed upon ſuſpicion, 1 & 2 *P.* & *M. cap.* 13. 2 & 3 *P.* & *M. cap.* 10. by which it appears, that juſtices of peace may commit for felony, yea or for ſuſpicion of felony, 3 *Jac. cap.* 10. 5 *H.* 4. *cap.* 10. ſo that the impriſonment before indictment is ſurely lawful and not within the reſtraint of *Magna Charta*; and if ſo, then ſurely their arreſt is much more lawful, for it is but to bring perſons to an examination in order to their commitment, bail, or diſcharge; and there is no greater record of their commitment than of their arreſts.

2. He may alſo iſſue a warrant to apprehend a perſon ſuſpected of felony, tho the original ſuſpicion be not in himſelf, but in the party that prays his warrant; and the reaſon is, becauſe [110] he is a competent judge of the probabilities offered to him of ſuch ſuſpicion.

And as a conſtable may upon complaint arreſt a perſon ſuſpected of felony, as appears by what hath been ſaid in the foregoing chapters (*), ſo a juſtice of peace may do the like by his warrant; and it is alſo the conſtant practice accordingly.

But that I may ſay it once for all, it is fit in all caſes of warrants for arreſting for felony, much more for ſuſpicion of felony, to examine upon oath the party requiring a warrant, as well whether a

(*) *Vide cap.* 10. *p.* 80. and *cap.* 11. *p.* 91. See alſo *Part* I. *p.* 610.

felony

felony were done, as alſo the cauſes of his ſuſpicion, for he is in this caſe a competent judge of thoſe circumſtances that may induce the granting of a warrant to arreſt.

And if there were no other reaſon to prove it than this, it were ſufficient; namely, that the juſtice of peace may commit him to gaol that is brought before him for ſuch ſuſpicion, or bail him, as appears by the ſtatutes of 1 *R.* 3. *cap.* 3. 3 *H.* 7. *cap.* 3. 1 & 2 *P.* & *M.* *cap.* 10. and therefore *à fortiori* may make a warrant to convene or bring him before him to examine the cauſe of the ſuſpicion.

II. As touching the ſecond matter, to whom this warrant is to be directed?

Uſually the warrant or precept is directed to the ſheriff, or bailiff, conſtable, or tithingman, and they are bound to execute it; and if they do not, they may be indicted and fined for their neglect.

But it may be directed to any private perſon or his own ſervant, 14 *H.* 8. 16. *a.* *Cromp. de Pace*, *f.* 147. *b* but he is not bound to execute it; but if he execute it, it is as good as if he were an officer.

If a warrant be directed from a juſtice of peace to a conſtable of *D.* to arreſt a felon, &c. he is not bound to go out of the vill, where he is conſtable, to execute the warrant; but yet if he do execute it in another vill, it is good enough, for he acts herein not ſimply as conſtable of *D.* but by virtue of the juſtice's warrant; and ſo it was ruled in my time at the aſſizes in *Norfolk* about 1668.

[111]

III. As to the third matter, how and in what manner it is to be made or iſſued? Touching which theſe things are regularly to be obſerved.

The party that demands it ought to be examined upon his oath touching the whole matter, whereupon the warrant is demanded, and that examination put into writing.

The party charging another thus with felony ought to be bound by recognizance to proſecute at the next ſeſſions or aſſizes, as the caſe ſhall require. *Dalt. cap.* 117. *p.* 334. *(a)*.

The warrant ought to be under the hand and ſeal of the juſtice, 2 *Co. Inſtit. p.* 52. It muſt have a certain date, but the place, tho it muſt be alledged in pleading, need not be expreſſed in the warrant. 14 *H.* 8. 16. *a.*

Regularly the warrant ought to contain the cauſe ſpecially, and ſhould not be generally *to anſwer ſuch matters as ſhall be objected*

(a) New Edit. cap. 169. *p.* 579.

againſt

againſt him, becauſe it cannot appear, whether it be within the juriſdiction of the juſtice of peace, neither can it appear whether the party be bailable or not. 2 *Co. Inſtit. p.* 52. 591.

And therefore upon ſuch a general warrant returned upon an *habeas corpus*, it is in the pleaſure of the court of king's bench to bail or diſcharge him; and accordingly for this reaſon, *P.* 23 *Car. B. R.* in *Brown*'s caſe, he was diſcharged.

But yet I hold ſuch a warrant is not therefore void, but if *de facto* the matter be within the juriſdiction of the juſtice, and ſo averred, ſuch a general warrant is a good juſtification eſpecially in caſe of felony, and antiently it was generally held ſuch general warrants were good in caſes of treaſon or felony (*), tho in warrants of the peace and good behaviour the cauſe muſt be ſhewn, that the party may come provided with his ſureties; and accordingly *vide Raſtal's Entries*, tit. *Attachment* 1. *Dalt. cap.* 117. *p.* 329. *(b)*, *Crompt. de Pace*, *f.* 148. *a. T.* 37 *Eliz. C. B. Broughton* and *Mulſhoe (c)*; and accordingly ruled by my lord *Coke* himſelf contrary to his [112] opinion in his comment upon *Magna Charta*, *T.* 7 *Jac. C. B.* the caſe of the mayor of *Canterbury*: *vide ſupra*, *Part* I. *cap.* 54. *p.* 609. *Breach* of priſon.

A juſtice of peace may make his warrant to apprehend a perſon ſuſpected by name upon a complaint made to him; but where upon a complaint to a juſtice of a robbery he made a warrant to apprehend all perſons ſuſpected, and bring them before him, this was ruled a void warrant, *P.* 24 *Car.* 1. in the caſe of juſtice *Swallowe*, and was not a ſufficient juſtification in falſe impriſonment.

A juſtice of peace may make a warrant as well in caſe of felony as of the peace to bring the party *before himſelf*, and then the officer ought to bring the party before him, that made the warrant, 5 *Co. Rep.* 59. *b. Foſter*'s caſe; or he may make the warrant to bring him *before any of his majeſty's juſtices of the peace*, or *before himſelf, or any of his majeſty's juſtices of the peace*, and then it is in the election of the officer to bring him before which juſtice of the county he pleaſes; and it is not in the election of the party to go before whom he pleaſes; adjudged 5 *Co. Rep.* 59. *b. Foſter*'s caſe againſt the opinion of *Fineux* 21 *H.* 7. 21. *a.*

(*) *Crompt.* 233. *b.* 1 *Sid.* 78. *Dalt. p.* 862. 5 *Mod. Rep. p.* 80. 82. 85. 57. and Sir *William Wyndham*'s caſe, *Trin.* 2 *Geo.* I. *B. R. Vide tamen* the caſe of *Kendal* and *Rowe*, *State Tr. Vol.* IV. *p.* 861, (b) *New. Edit. p.* 574. (c) *Moore*, *p.* 408.

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And in ſome caſes he may make his warrant to bring him to the ſeſſions of the peace, tho it is better to bring him before himſelf or ſome juſtice, that the party may be in the mean time bailed, if there be cauſe, to appear at the ſeſſions of the peace or gaol-delivery, as the cauſe ſhall require.

A warrant of the peace may be to bring the party complained of to the juſtice, to the intent to find ſureties for his appearance at the ſeſſions, &c. and in the mean time to keep the peace, or the warrant may be *ſi recuſaverit*, then to bring him to the common gaol *ibidem moraturus, quouſque gratis hoc fecerit*; and yet the conſtable or officer may bring him in that caſe before the juſtice; and if he refuſe there to give ſureties, he may by virtue of the firſt warrant bring him to gaol, and commit without any farther warrant or *mittimus*, 5 *Co. Rep.* 59. *b. Foſter's* caſe.

[113] The warrant of a juſtice before indictment may be in the king's name with the *Teſte* of the juſtice, or it may be in the name of the juſtice of peace himſelf; the latter moſt uſual; but proceſs after indictment iſſued from a ſeſſions of the peace is always in the king's name, *Dalt. Juſtice, p.* 404. 347, 348. *(d)*. But whether generally a juſtice of peace out of ſeſſions can iſſue a warrant to apprehend perſons offending againſt a penal law, tho within their cognizance, and ſo to bind them over to the ſeſſions, or in default thereof to commit them, and this before indictment, ſeems doubtful: *vide Lamb.* 188, 189. *Dalt. cap.* 117. *p.* 331. *(e)*. Theſe things ſeem to make againſt it. 1. Becauſe ſome acts of parliament do particularly and expreſly authorize them to it, which they would not have done, if it had been otherwiſe lawful. 2. Becauſe in moſt caſes of this nature, tho the party were indicted, or an information preferred, yet the *capias* was not the firſt proceſs but a *venire facias* and *diſtringas*, and in caſes of information no proceſs of outlawry at all, 8 *H.* 6. 9. *b.* until the ſtatute of 21 *Jac. cap* 4. gave proceſs of outlawry in actions popular, as in actions of treſpaſs *vi & armis*.

In caſe of a complaint and oath of goods ſtolen, and that he ſuſpects the goods are in ſuch a houſe, and ſhews the cauſe of his ſuſpicion, the juſtice of peace may grant a warrant to ſearch in thoſe ſuſpected places mentioned in his warrant, and to attach the goods and the party in whoſe cuſtody they are found, and bring them before him or ſome juſtice of peace to give an account how he came by them, and farther

(d) New Edit. p. 593. *(e) New Edit. p.* 576.

to

to abide ſuch order, as to law ſhall appertain: *vide Dalt. p.* 353. *(f)*

And this is warrantable by law, and without it felons could not in many caſes be diſcovered, and is the conſtant practice at this day, notwithſtanding the opinion of my lord *Coke* in his juriſdiction of courts, *p.* 176.

But in that caſe it is convenient, 1. To expreſs that the ſearches be made in the day-time. 2. That the party ſuſpecting be preſent to give the officer information of his goods. 3. There can be no breaking open of doors to make the ſearch, but he muſt enter [114] *per oſtia aperta*, or upon the voluntary opening of the door by the houſe-keeper or his ſervants; and the reaſon is, becauſe the bare having of ſtolen goods in his houſe doth not neceſſarily make a man either a felon or acceſſary. 4. But becauſe the having of ſtolen goods in his cuſtody is *primâ facie* an evidence of a felony and a good cauſe of ſuſpicion, it is a lawful clauſe in the warrant to attach the party, in whoſe cuſtody they are found, to come before the juſtice. 5. The goods being found ought not to be delivered to the party complaining, but to remain in the conſtable's hand, till either by a writ of reſtitution upon the conviction of the felony, or by due order of the court they be delivered.

But the general warrant to ſearch all places, whereof the party and officer have ſuſpicion, tho it be uſual, yet it is not ſo ſafe upon the reaſon of juſtice *Swallow*'s caſe before cited; and yet ſee precedents of ſuch general warrants, *Dalt p.* 353, 354.

The warrant of a juſtice of peace ought regularly to mention the name of the party to be attached, and muſt not be left in generals or with blanks to be filled up by the party afterwards. *Dalt. cap.* 117. *p.* 329. *(g)*. If there be a riot or breach of the peace in the preſence of one or more juſtices, they may arreſt the rioters themſelves, or command any officers or others by word of mouth without warrant to arreſt them, and they may by virtue thereof *flagrante crimine* arreſt them in the abſence of the juſtice by the true meaning of the ſtatute of 34 *E.* 3. *cap.* 1. and 13 *H.* 4. *cap.* 7. *quod vide* adjudged 14 *H.* 7. 9 & 10.

And therefore if a riot be committed and diſperſed by the coming of the juſtice of peace, and they be ſuſpected probably to meet again or threaten to do ſo, tho the conſtables may *ex officio* ſuppreſs the riot,

(f) New Edit. p. 598. *(g) New Edit. p.* 574.

and raiſe the power of the vill to do it; yet I think it clear, that a juſtice of peace may deliver a ſpecial warrant in the hands of any perſon to arreſt the rioters, if they re-aſſemble, tho there be no particular
[115] perſons named in the warrant, becauſe it may be impoſſible to be known what their names are, and yet the peace is neceſſary to be kept, as well as the breach of it to be puniſhed; and the juſtice cannot always perſonally watch their re-aſſembling, but muſt truſt others to do it; and this is admitted of all hands in the book of 14 *H.* 7. 9. and the only doubt is, whether it may be done by word, which yet is adjudged there good.

And thus far for warrants.

IV. The fourth thing is the manner and order of their execution.

If a warrant or precept to arreſt a felon come to an officer or other, if the felon be arreſted and after arreſt eſcape into another county, yet he may be purſued and taken upon freſh purſuit, and brought before the juſtice of the county where the warrant iſſued, for the law adjudgeth him always in the officer's cuſtody by virtue of the firſt arreſt; but if he eſcapes before arreſt into another county, if it be a warrant barely for a miſdemeanor, it ſeems the officer cannot purſue him into another county, becauſe out of the juriſdiction of the juſtice that granted the warrant; but in caſe of felony, affray, or dangerous wounding, the officer may purſue him, and raiſe *hue* and *cry* upon him into any county, but if he takes him in a foreign county, he is to bring him to the gaol or juſtice of that county, where he is taken, for he doth not take him purely by the warrant of the juſtice, but by the authority that the law gives him; and the juſtice's warrant is a ſufficient cauſe of ſuſpicion and purſuit. 2 *E.* 4. 6. *b.* *Dalt. cap.* 118. *p.* 340. *(h)*, 7 *E.* 3. 16. *b.* 11 *E.* 4. 4. *b.*

Tho a perſon, that hath a warrant to arreſt for felony or other miſdemeanor, may call others to his aſſiſtance, yet he cannot make a warrant to another as his deputy to execute it, or command another to execute it in his abſence. 8 *E.* 4. 14. *a.*

But it is held, that if the warrant be directed to the ſheriff, he may make a warrant to his bailiff to execute it, and may command by word his under-ſheriff to execute it without any other warrant. 8 *E.* 4. 14. *a.* *Dalt. cap.* 117. *p.* 332. *(i)*.

(h) *New Edit. p.* 24. & 585. *(i)* *New Edit. p.* 577.

If

If a warrant iſſue from a *juſtice* of peace to a private perſon to arreſt for felony or any other matter, he is not bound to ſhew his warrant, unleſs it be demanded, and then he muſt ſhew it.

But if it be directed to a known officer, as to the ſheriff, who is a known officer in the county, or to a conſtable, who is a known officer in the vill, he is not bound to ſhew his warrant, tho demanded, no more than a bailiff *jurus & conus*; it is enough for him to ſay *I arreſt you for felony*, &c. *in the king's name*. 8 *E.* 4. 14. *a.* 14 *H.* 7. 9. *b.* 21 *H.* 7. 23. *a.* 9 *Co. Rep.* 69. *Mackally*'s caſe (*).

But it is reaſonable and alſo ſafe for the officer to acquaint him what he attacheth or arreſteth him for, for it is a great ſecurity to the officer that arreſts him, and juſt for the party arreſted to know the cauſe for what it is.

A warrant of a juſtice of peace to arreſt for felony may be executed in a franchiſe within the county, for it is the king's ſuit, in which a *non omittas* is virtually included.

Where by virtue of a warrant from a juſtice of peace the houſe may be broken to apprehend a felon or other malefactor, there are theſe diverſities.

Upon a warrant to ſearch for ſtolen goods the doors cannot be broken open; for tho it be for the king, yet the law enables not the breaking of houſes in all caſes for the king: (*vide* ſtatute 12 *Car.* 2. *cap.* 19. a ſpecial act to enable the ſearch and breaking open of an houſe in caſe of goods uncuſtomed) and therefore the entry to ſearch by ſuch a warrant muſt be *per oſtia aperta.*

So upon an *excommunicato capiendo*, tho it be the king's ſuit, yet doors cannot be broken to take him. *H.* 42 *Eliz. C. B. Croke, n.* 17. *Smith* and *Smith* (*k*).

If a juſtice of peace iſſues a warrant to apprehend a felon, who is in his own houſe, and after notice of the warrant and requeſt to open the door it is refuſed or neglected to be done, the [117] officer may break open the door to take him; and the ſame law is, if it be but for ſuſpicion of felony. 13 *E.* 4. 9. *a.* 5 *Co. Rep.* 91. *b.* *Semain*'s caſe (†).

(*) This was an an arreſt in a civil action, and the warrant there meant was not the writ or warrant for arreſting the party, but the general warrant conſtituting him bailiff, and of this are the caſes in the year-books here cited to be underſtood; tho it may be otherwiſe in caſe of felony, becauſe in ſuch caſe a private perſon may arreſt a felon without any warrant at all. *Vide Part* I. *p.* 458 *in notis.*

(*k*) *Cro. Eliz.* 741.

(†) *Part* I. *p.* 582.

And ſo much more may he break open the houſe of another perſon to take him, for ſo the ſheriff may do upon a civil proceſs. 5 *Co. Rep.* 93. *a. Semain*'s caſe. But then he muſt at his peril ſee that the felon be there, for if the felon be not there, he is a treſpaſſer to the ſtranger whoſe houſe it is; but in both caſes the officer muſt firſt notify his buſineſs that he comes about, and demand admiſſion. *Ibidem.*

But in caſe of warrants to ſearch for ſtolen goods I think the doors of any perſon cannot be broken up.

If a warrant of the peace iſſue from a juſtice of peace, the officer or miniſter of ſuch warrant may break open a door in caſe of refuſal to open after demand and notice of his buſineſs: ruled by *Popham* and *Clerk* 3 *Jac. Dalt. cap.* 78. *p.* 204, 205. *(l).*

Now touching the killing of a man *juſticiari ſe nolentis*, where there is a lawful warrant againſt him, much hath been ſaid before; where I conſidered the conſtable's power (*); ſomewhat I ſhall ſay here.

It is neceſſary in this caſe to conſider the difference between an arreſt upon a warrant for felony, and an arreſt for a ſimple miſdemeanor.

And alſo a difference if the officer kills him in caſe of a flight, or of a reſiſtance and an attempt of a reſcue after arreſt.

If there be a warrant againſt *A.* for a treſpaſs or breach of the peace, and *A.* flies and will not yield to the arreſt, or being taken makes his eſcape, the miniſter kills him, this is murder.

But if *A.* either upon the attempt to arreſt, or after the arreſt aſſault the miniſter, that hath the warrant to arreſt him, to the intent to make his eſcape from him, and the miniſter ſtanding upon his guard kills him, this is no felony, for being by law author- [118] ized to arreſt him, he is not bound to go back to the wall, as in common caſes of *ſe defendendo*, for the law is his protection. And therefore as on the one ſide if *A.* kills him, it is murder, ſo on the other ſide if upon this aſſault by *A.* the miniſter kills him, it is no felony; the neceſſity excuſeth him, if he cannot otherwiſe ſave himſelf and perform his duty.

And herein it agrees with the common caſe of a ſheriff's bailiff in the execution of his warrant. *Co. P. C. cap.* 8. *p.* 56.

(l) New Edit. cap. 127. *p.* 427. (*) *Supra, p.* 91 & 77. *Part* I. *p.* 489.

But

But where a warrant iſſueth againſt a felon, and either before arreſt or after he flies and defends himſelf with ſtones, as the book of 3 *E.* 3. *Coron.* 290. or with his bow and arrows, as the record is of *M.* 22 *E.* 3. *Rot.* 117. *coram rege Ebor (m)*, ſo that the officer muſt give over his purſuit, or otherwiſe cannot take him without killing him, if he kills him, it is no felony; and the ſame law is for a conſtable, that doth it *virtute officii*, or upon a purſuit of *hue* and *cry*.

And the ſame law it is, if in truth he were no felon, but yet a warrant is againſt him as ſuſpect of felony, and he having notice thereof flies and reſiſts, for the officer or miniſter ought to purſue his warrant, or otherwiſe he is puniſhable; and the party by his flight and reſiſtance is acceſſary to his own death.

But then there muſt be theſe cautions. 1. He muſt be a lawful officer, or there muſt be a *hue* and *cry*, or there muſt be a lawful warrant. 2. That the party ought to have notice of the reaſon of the purſuit, namely becauſe a warrant is againſt him, for his flight muſt be upon notice to him of the intent to arreſt him for felony. 2 *E.* 4. 9. *a.* And 3. It muſt be a caſe of neceſſity, and that not ſuch a neceſſity as in the former caſe, where an immediate [119] aſſault is made upon the miniſter juſt at his coming to arreſt, or to reſcue himſelf from him; but this is the neceſſity, *viz.* that he cannot otherwiſe be taken, and the reaſon is, becauſe it is for the public good, and they are puniſhable, if they neglect in any manner what they ought to do, namely the miniſter by fine and impriſonment, and the townſhip by an amercement.

But tho a private perſon may arreſt a felon, and if he flies ſo as he cannot be taken without he be kild, it is excuſable in this caſe for the neceſſity, 22 *Aſſiz.* 55. *per Thorp*, yet it is at his peril, that the party be a felon, for if he be innocent of the felony, the killing, at leaſt before the arreſt, ſeems at leaſt manſlaughter for the reaſon above

(m) This was the caſe of *Henry Veſcy*, who had been indicted before the ſheriff *in Turno ſuo anno R. R. nono* of divers felonies, whereupon the ſheriff *mandavit commiſſionem ſuam* Henrico *de* Clyderawe & *aliis ad capiendum prædictum* H. Veſcy & *ſalvo & ducendum uſque caſtrum de* Ebor'. *Veſcy* would not ſubmit to an arreſt, but fled, & *inter fugiendum* ſhot with his bow and arrows at his purſuers, but in the end was kild by *Clyderawe*. *Clyderawe* was afterwards indicted, "quòd felonicè interfecit prædictum *H. Veſcy*, ſed quia "compertum eſt, quód prædictus *H de* "*Clyderawe* prædictum *H. Veſcy* indictatum de diverſis felonïis fugam faciendo, ut felonem domini regis, virtute "commiſſionis ſuæ prædictæ anno R. "nono interfecit & non felonicè; contideratum eſt, quod idem *H. de Clyderawe* eat inde quietus."

given, for an innocent perſon is not bound to take notice of a private perſon's ſuſpicion (*).

If a juſtice of peace have juriſdiction in the caſe, (as he hath in all felonies and breaches of the peace, yea tho it be high-treaſon, ſo far forth as it is a breach of the peace) tho he errs in granting of his warrant, it ſeems that the officer that executes it, is excuſable. 14 *H.* 8. 16. *a. per curiam.*

Yet in ſome caſes, as touching rates for the poor, tho he hath juriſdiction in the matter by the ſtatute of 43 *Eliz. cap.* 2. the officer is puniſhable for executing the warrant, where none ought to iſſue, becauſe it is a circumſcribed particular juriſdiction given him by act of parliament, which he ought ſtrictly to purſue. *T.* 10 *Car. B. R.* 2 *Rol. Abr.* 560. *Nichols* and *Walker.*

When the officer or miniſter hath made his arreſt, he is forthwith to bring the party to the gaol, or to the juſtice, according to the import of the warrant.

But if the time be unſeaſonable as in or near the night, whereby he cannot attend the juſtice, or if there be danger of a preſent reſcue, or if the party be ſick and not able at preſent to be brought, he may, as the caſe ſhall require, ſecure him in the ſtocks, or in caſe the [120] quality of the perſon or the indiſpoſition ſo require, ſecure him in a houſe till the next day, or ſuch time as it may be reaſonable to bring him. 2 *E.* 4. 9 & 10. (†).

When he hath brought him to the juſtice, yet he is in law ſtill in his cuſtody, till either the juſtice diſcharge or bail him, or till he be actually committed to the gaol by warrant of the juſtice. 10 *H.* 4. 7. *a. Eſcape* 8.

And thus far concerning arreſts by warrant or precept.

See Burn. tit. Arreſt. Index to 2 Hawk. P. C. tit. Arreſt. 4 Blackſ. Comr ch. 21. Of Arreſts. pa. 289. &c. See 2 Wilſon 288. Entick v. Carrington touching General Warrants.

(*) *Vide ſupra, p.* 83. (†) *Vide ſupra, p.* 95, 96.

CHAP.

CHAP. XIV.

Concerning the office of a juſtice, *when a perſon charged or ſuſpected of* felony *is* brought before him.

WHEN a party thus arreſted for felony is brought to the juſtice of peace, he muſt either diſcharge, or commit, or bail him.

But preparatory to theſe acts there are ſome things, that are required of him before he do either.

1. By the ſtatute of 1 & 2 *P. & M. cap.* 13. and 2 & 3 *P. & M. cap.* 10. he is to take the informations upon oath of the proſecutor and witneſſes and put them into writing; and he is likewiſe to take the examination of the perſon accuſed, but this is to be without oath and put into writing.

And theſe examinations and informations he is afterwards to deliver into the general ſeſſions of the peace or to the gaol-delivery, as the caſe ſhall require; and becauſe it may be unſeaſonable to take theſe informations or examinations preſently, or poſſibly it may take longer time, the priſoner may be continued in the cuſtody of the officer, or may be detained in the juſtice's houſe, or committed to ſome near ſafe place of cuſtody, till the examinations can be taken.

But this muſt be diſpatched in ſome convenient time, and therefore, *P.* 43 *Eliz. C. B. Scavage* and *Tateham (a)*, in [121] an action of falſe impriſonment brought by a perſon brought before the mayor of *Pomfret*, a juſtice of peace, upon ſuſpicion of felony, the defendant could not upon the account of examination juſtify the detaining him in the juſtice's houſe nineteen days; but it was held, that he might detain him three days upon that account.

2. It is fit to take a recognizance from the proſecutor to appear and prefer a bill of indictment, and alſo of the witneſſes to appear and give evidence at the next ſeſſions of the peace or gaol-delivery, as the caſe ſhall require, if he ſhall find cauſe to commit or bail the priſoner; otherwiſe it is, if he ſhall diſcharge him.

Theſe things being thus premiſed, as I ſaid, the priſoner is either to be diſcharged, or committed, or bailed.

(*a*) *Cro. Eliz.* 829. *Vide Part* I. *p.* 586.

I. Touching

I. Touching the diſcharge of a priſoner. If a priſoner be brought before a juſtice of peace expreſly charged with felony by the oath of a party, the juſtice cannot diſcharge him, but muſt bail or commit him.

If he be charged with ſuſpicion only of felony, yet if there be no felony at all proved to be committed, or if the fact charged as a felony be in truth no felony in point of law, the juſtice of peace may diſcharge him, as if a man be charged with felony for ſtealing of a parcel of the freehold, or for carrying away what was deliverd him, and ſuch like, for which tho there may be cauſe to bind him over as for a treſpaſs, the juſtice may diſcharge him as to felony, becauſe it is not felony, *Kelw. f.* 34. 44 *Aſſiz.* 12. *Poulton de Pace* 146. *b.* But if a man be kild by another, tho it be *per infortunium* or *ſe defendendo*, (which is not properly felony,) or in making an aſſault upon a miniſter of juſtice in execution of his office, (which is not at all felony,) yet the juſtice ought not to diſcharge him, for he muſt undergo his trial for it; and therefore he muſt be committed, or at leaſt bailed.

[122] II. As touching commitment or impriſonment of a party brought before a juſtice for felony, or ſuſpicion thereof, theſe things are to be obſerved:

1. The commitment muſt be by writing under the ſeal of the juſtice.

And therefore altho a juſtice may by word of mouth arreſt a perſon for a breach of the peace done in his preſence, yet in that caſe the commitment of him ought to be a *mittimus* under ſeal; thus it was reſolved in *Sandford*'s caſe (*), *P.* 23 *Car.* 1. *B. R.* but agreed he may detain him in his cuſtody, till a warrant can be made.

And herein the power of a juſtice differs from the power of a court; for the court of king's bench may commit by order, and ſo may the court of ſeſſions of the peace, becauſe there is or ought to be a record of the commitment.

Nay in chancery, if an order be made for commitment of a perſon, till he enter into bond, *&c.* the warden of the *Fleet* may juſtify the impriſonment by virtue of that order. *T.* 39 *Eliz. B. R.* 2 *Rol. Abr. p.* 559. *Taylor* and *Beal.*

(*) *Part* I. *p.* 612.

2. The

2. The *mittimus* ought to have theſe circumſtances. 1. It muſt contain the certainty of the cauſe, and therefore if it be for felony, it ought not to be generally *pro felonia*, but it muſt contain the eſpecial nature of the felony briefly, as *for felony for the death of J. S.* or *for burglary in breaking the houſe of J. S. &c.* and the reaſon is, becauſe it may appear to the judges of the king's bench upon an *habeas corpus*, whether it be felony or not (†): and likewiſe by the ſtatute of 3 *H.* 7. *cap.* 3. the ſheriff is to make a calendar of the priſoners in his gaol, and deliver it to the juſtice of gaol-delivery ſignifying the priſoners and their cauſes: *vide* 2 *Co. Inſtit.* 52 & 591. 2. It is fit to mention the name of the juſtice, and his authority in the beginning of the *mittimus*, tho this is not always neceſſary, for the ſeal and ſubſcription of the juſtice to the *mittimus* is ſufficient warrant to the gaoler: *vide ſapra* (**) & *Dalt.* 355 & 383. *(b)*, for it may be ſupplied by averment, that it was done by the juſtice. 3. It muſt have a certain date of the year and day (*). 4. It ſhould have an apt concluſion, namely to detain him till he be thence deliverd by due courſe of law. 2 *Co. Inſtit. ubi ſupra* (†). [123]

But altho it be true, that theſe things are regular and fit, namely the cauſe, the juſtice committing, the date, the apt concluſion, yet I am far from thinking the warrant void, that hath not all theſe circumſtances.

And therefore the juſtification in falſe impriſonment againſt the gaoler may be good by virtue of ſuch a warrant; and it ſeems to me, (contrary to the opinion of my lord *Coke*, *ubi ſupra*,) that if an eſcape be ſuffered willingly by the gaoler upon ſuch a general warrant, it will be felony in him: *vide quæ ſupra*, *cap.* 54. *Part* I. *p.* 609. *De frangentibus priſonam (c)*.

And therefore if the concluſion of the *mittimus* be to detain him till further order by the juſtice, it is true it is an unapt concluſion, and therefore binds not up the hands of the juſtices, to whom it may belong, to bail or deliver him, as the caſe ſhall require; but the commitment is notwithſtanding good, if there be any tolerable certainty in the body of the warrant for what it is, as for felony generally, tho the particular is beſt to be expreſſed.

(†) *Vide ſupra*, *p.* 111.
(*) *Part* I. *p.* 577.
(**) *New Edit. p.* 575 & 593.

(*) *Supra*, *p.* 111.
(†) *Vide Part* I. *p.* 584.
(*c*) See alſo *Part.* I. *p.* 595.

3. Regularly

3. Regularly the commitment is to be to the common gaol of the county, or if the offenſe be committed and the party taken within a franchiſe that hath a gaol, (as the *Gatehouſe* at *Weſtminſter,*) then to the gaol of the franchiſe, by the ſtatute of 5 *H.* 4. *cap.* 10.

Only ſometimes it hath been uſed by the juſtices of peace to ſend ſuch priſoners, which are bailable and have not their bail ready, to ſome private priſon, as the *New Priſon* in *Middleſex* for ſome ſhort time, till they can procure their bail: but this hath always been diſliked by the juſtices of the king's bench and gaol-delivery as inconvenient, and not agreeable to the law *(d)*.

4. If the priſoner be bailable, yet the juſtice is not bound to demand bail, but the priſoner is bound to tender it, otherwiſe the
[124] juſtice may commit him; *quod vide* 14 *H.* . . *a. per Fineux*, accordingly adjudged *T.* 40 *Eliz.* . . *Collin's* caſe; and ſo of a ſheriff, that hath taken a man by *capias*, where he is bailable.

Thus far touching commitment of an offender.

But in ſome caſes the offender is neither diſcharged nor committed, but bailed, and that comes next to be conſidered.

But becauſe the buſineſs of bail is large and various, I ſhall refer that to the next chapter.

Burn. Title Juſtices of the Peace.

(d) See the caſe of *Kendal* and *Roe*, *State Tr. Vol.* IV. *p.* 862. *& ſupra, Part* I. *p.* 585. *in notis.*

CHAP. XV.

Concerning bail *and* mainpriſe.

TOUCHING bailing of felons, *&c.* there will be theſe things inquirable. 1. What it is, and the nature and kinds of it. 2. In what caſes it may be, and in what not. 3. By whom *(a)*. 4. In what manner it is to be done, by writ or without writ *(b)*. 5. The penalty of erring therein *(c)*.

(a) Infra, cap. 16. *& ſub fine cap.* 17.
(b) Infra, cap. 17.
(c) Infra, ſub fine hujus capitis.

Touching

Touching the *firſt*, namely the nature of bail.

Bail and mainpriſe are uſed promiſcuouſly oftentimes for the ſame thing, and indeed the words import much the ſame thing, for the former is *traditus J. S.* and the other is *manucaptus per J. S.*

But yet in a proper and legal ſenſe they differ. 1. Always mainpriſe is a recognizance in the ſum certain, but bail is not always ſo. 2. He, that is deliverd *per manucaptionem* only, is out of cuſtody; but he that is bailed, is in ſuppoſition of law ſtill in cuſtody, and the parties that take him to bail are in law his keepers, and may re-ſeize him to bring him *in*; and therefore if a man be let to mainpriſe, ſuppoſe in the king's bench, an appeal or other ſuit cannot be brought againſt him as *in cuſtodi mareſcalli*; but if he be let to bail, he is in ſuppoſition of law ſtill *in cuſtodiâ mareſcalli*, 33 *E.* 3. *Mainpriſe* 12. 36 *E.* 3. *Ibidem* 13. 32 *H.* 6. 4. *a. Protection* 13. and accordingly the books of 21 *H.* 7. 20. *b. per Fineux*, and [125] 9 *E.* 4. 2. *a.* that ſeem to differ, are to be underſtood. 3. Tho ſometimes the recognizances themſelves both in bail and mainpriſe are in ſums certain, as ſhall be ſhewn, yet the entry on record in the one caſe is *deliberatur per manucaptionem*, and in the other caſe *traditur in ballium*.

But now for the kinds of bail properly ſo called, it is of theſe kinds.

1. Sometimes it is in no ſum certain at all, but *traditur in ballium* to *J. S.* and this is the uſual form in all bails in civil actions in the king's bench; and antiently it was ſo alſo in criminal caſes, tho now, as ſhall be ſhewn, it differs.

And of this kind was the antient form of that bail, which was *corpus pro corpore*, which now is rarely uſed in that form, and the reaſon why that is diſuſed is, becauſe there was antiently a looſe opinion, that he, who was bail in this manner for a felon, was to be hanged, if he brought not in the principal to keep his day, 33 *E.* 3. *Mainpriſe* 12. but the truth is, all his puniſhment is to be fined for his default. *Crompt. Juſtice. f.* 157. *a.* 11 *H.* 6. 31. *b.*

And ſo in civil actions, where this kind of bail is ſometimes in uſe, as appears 27 *H.* 8. 11 & 12. 21 *H.* 7. 20. *b.* the bail is amerced, if he have not the principal at the day.

2. Sometimes the bail is only a recognizance in a ſum certain for the appearance of a felon, and this is uſual, *viz.* the principal in double the ſum; as for inſtance in 40*l.* or more, the ſureties each of

of them in 20*l.* a-piece *ad comparendum & ſtandum recto in curiâ de latrocinio prædicto ſecundùm legem, &c. Dalt. cap.* 114. *p.* 305. *(a).*

The ſureties ought to be at leaſt two men of ability, and their number and ſufficiency and the ſum of the recognizance is much in the diſcretion of him that is to take it, and therefore he may examine them upon oath; but how theſe are puniſhable that take inſufficient bail, ſhall be ſaid hereafter.

[126] The ſureties *ad ſtandum juri* doth import alſo, that he ſhall plead to the felony; and therefore before the ſtatute of *Marlbridge, cap.* 28. *(b)*, if the felon had ſtood upon his *privilegium clericale* and would not anſwer the felony, his bail had been amerced, which is remedied by that ſtatute.

3. The third ſort of bail is that, which is indeed the true and regular bail, which is not only a recognizance in a ſum certain, but alſo a taking to bail, the true form whereof is contained in *Lambert's Juſtice, Lib.* I. *cap.* 23. *p.* 264. *Memorand' quòd die, anno, &c. coram, &c. venerunt* A. & B. & *ceperunt in ballium* J. S. *captum & detentum pro ſuſpicione cujuſdam feloniæ uſquæ proximam generalem gaolæ deliberationem in comitatu prædicto tenend', & aſſumpſerunt, viz. quilibet eorum ſub pœna* 20*l. de bonis & catallis, terris & tenementis eorum & cujuſlibet eorum ad opus dicti domini regis levand', ſi prædictus* J. S. *ad eandem proximam gaolæ deliberationem non perſonaliter comparebit coram juſticiariis dicti domini regis ad dictam goalam deliberand' aſſignatis ad reſpondendum dicto domino regi tunc & ibidem ſuper præmiſſis,* or *ſuper iis, quæ ad tunc & ibidem ipſi objicientur,* or rather according to the antient form *ad ſtandum recto de latrocinio prædicto ſecundùm legem & conſuetudinem regni* Angliæ. *Dat. ſub ſigillis noſtris, die, anno, &c. Vide F. N. B.* 250. *Crompt.* 157. *b.*

But the ſeal need not be, for he is a judge of record, only his hand ſimply ſubſcribed, or ſubſcribed *capt. & cognitus die & anno ſupradicto coram* Math. Hale.

This is the form of a bail, where the principal is either an infant or in priſon, and ſo abſent; and thereupon a warrant iſſues under the hand and ſeal of him that takes the bail for his enlargement, called a *liberate.*

But if he be bailed by a juſtice of peace before commitment, or if committed and brought into the court of king's bench or ſeſſions to

(a) New Edit. cap. 166. *p.* 150. *(b) 2 Co. Inſtit. p.* 150.

be bailed, then the party himſelf is alſo bound; and ſometimes the recognizance is ſimple with a condition added for his appearance, and ſometimes the condition is containd in the body of the recognizance, *ut ſupra:* Only it is to be remembred, that when any perſon is bailed for any miſdemeanor either upon the return of an *habeas corpus* or otherwiſe, the return or record ought to be [127] firſt filed, and a *committitur mareſcallo* entred, and then bail taken; for all perſons, that are bailed in the king's bench, are *de facto*, or in ſuppoſition of law firſt ſuppoſed to be *in cuſtodiâ mareſcalli.*

The advantage of this kind of bail is this, that it is not only a recognizance in a ſum certain, but alſo a real bail, and they are his keepers, and may be puniſhed by fine beyond the ſum mentiond in the recognizance, if there be cauſe, and may re-ſeize the priſoner, if they doubt his eſcape, and bring him before the juſtice or court, and he ſhall be committed, and ſo the bail be diſcharged of his recognizance. 36 *E.* 3. *Mainpriſe* 13. 32 *E.* 3. *Mainpriſe* 23. *Crompt. Juſtice, f.* 157. *a.*

Touching the *ſecond*, in what caſes a perſon is bailable, that is accuſed or indicted of felony or acceſſary, or in relation thereunto.

I ſhall not meddle with bailing of priſoners in civil actions or for offenſes leſs than felony by acts of parliament, only thus much.

Regularly in all offenſes either againſt the common law or acts of parliament, that are below felony, the offender is bailable, unleſs, 1. He hath had judgment. 2. Or that by ſome particular or ſpecial act of parliament bail is ouſted.

What acts of parliament ouſt bail in particular offenſes againſt thoſe acts is not my purpoſe to declare, they are very well collected by Mr. *Dalton, cap.* 114. *(c)*, and Mr. *Crompton de pace regis, f.* 154. *b. & ſequentibus.*

In relation to capital offenſes there are eſpecially theſe acts of parliament, that are the common land-marks touching offenſes bailable or not bailable, *viz.* 3 *E.* 1. or *Weſtm.* 1. *cap.* 15. 34 *E.* 3. *cap.* 1. 23 *H.* 6. *cap.* 10. 1 *R.* 3. *cap.* 3. 3 *H.* 7. *cap.* 3. 1 & 2 *P. & M. cap.* 13. and 2 & 3 *P. & M. cap.* 10.

As to the ſtatute of 3 *E.* 1. it declares, who are bailable and who not as well in other caſes, as in caſes capital.

(c) *New Edit. cap.* 166. *p.* 553.

But

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But at that time few were concerned in bailing of priſoners, but the ſheriff, in whoſe cuſtody they moſt commonly were, and ſuch ſubordinate officers, that either under the ſheriff or as bailiffs of liberties had the cuſtody of priſoners, [as appears from the words of the ſtatute,] *Et pur ceo que viſcounts & autres queux ont priſe & retenus priſoners:* And therefore ſtill the ſtatute did not extend to courts of juſtice, much leſs to the court of king's bench: *vide* 2 *Co. Inſtit. p.* 185, 186. *ſuper hoc ſtatutum*; neither doth this ſtatute ſingly of itſelf extend to juſtices of the peace, for they were not in being till 1 *E.* 3. and therefore the ſtatute of 1 & 2 *P. & M. cap.* 13. eſpecially makes this ſtatute of 3 *E.* 1. a direction touching bailing of offenders.

And therefore it ſeems alſo upon the ſame reaſon the ſtatute of 27 *E.* 1. *cap.* 3. *de finibus levatis*, that directs and authorizeth juſtices of gaol-delivery to inquire of ſheriffs and others, that have let out of priſon by replevying perſons not repleviſable, or have offended againſt the ſtatute of *Weſtminſter*, and to puniſh them according to that ſtatute, extends not to courts or juſtices of the peace, but only to ſheriffs and ſubordinate officers.

And the truth is, it could not be well applicable to any but them, for as all writs of *homine replegiando, de manucaptione, & de odio & atiâ* were directed to the ſheriffs, ſo in moſt caſes what was to be done in thoſe times for bailing of priſoners was moſt commonly to be done by the ſheriff.

This ſtatute declares, 1. Who were not bailable by the common law. 2. Who from thenceforth ſhould not be bailable; and 3. Who ſhould be bailable, and inflicts puniſhment upon ſheriffs and bailiffs bailing thoſe that are not repleviſable, and not bailing thoſe that are repleviſable.

And this act extends not only to ſuch bailments as might be *virtute officii*, but alſo to bailments by force of the common writ *de homine replegiando* or *de manucaptione*; whereof hereafter.

My lord *Coke* in his comment upon this chapter *(d)* hath given us the ſubſtance and intent of this ſtatute, which I ſhall therefore but in effect tranſcribe.

[129] I. As to thoſe that were irrepleviſable at common law, I mean before the ſtatute of 3 *E.* 1. (for poſſibly more antiently all offenders were repleviſable), they are of four ſorts.

1. *For the death of a man.*

(d) 2 *Co. Inſtit. p.* 186 *& ſeq.*

At

At this time there was held little difference between murder and manſlaughter, but only in degree; for till 23 *H.* 8. clergy was allowable in the one as well as in the other, nay, at this day, if the indictment run only *interfecit & murdravit* without *ex malitiâ præcogitatâ*, the priſoner hath clergy.

And as to the point of *bail* no difference was at common law, nor after the ſtatute of 3 *E.* 1. till later ſtatutes *(de quibus infra)*, between murder, manſlaughter, or the killing of a man *ſe defendendo*, or *per infortunium*, for they, that could not bail in murder, regularly could not bail in the other three caſes.

And this held univerſally as to bailment by the ſheriff or by the juſtices of peace; but as to others, it had ſome exceptions.

The court of king's bench might and ſtill may bail in any caſe whatſoever, even in high treaſon or murder, for the court is held in law *coram ipſo rege*. 4 *Co. Inſtit. p.* 71. 2 *Co. Inſtit. p.* 186. but this is in the diſcretion of the court, and none can challenge it *de jure*.

And this bailment in the king's bench may be upon an original indictment before them in the county where they ſit, or upon an indictment removed by *certiorari*, or upon a priſoner removed by *habeas corpus* before or after an indictment taken; *vide infra*.

In ſome caſes juſtices of gaol-delivery may bail in caſe of the death of a man.

1. If a man be found guilty of a death *ſe defendendo*, or *per infortunium* upon his trial, the juſtices of gaol-delivery may certify the matter into *chancery*, that the party may ſue his pardon of courſe, and in the mean time bail him till the next ſeſſions. 3 *E.* 3. *Coron.* 361.

And the ſame law it is, if the coroner's inqueſt only find it *ſe defendendo*, ſuch inquiſition ſhewing the ſpecial matter, as it ought, is good, *Stamf. P. C. cap.* 7. *f.* 15. *b.* 26 *Eliz. Holmes's* caſe, *Crompt. de pace*, *f.* 153. *b.* & 28. *a.* and the reaſon of the book of 12 *E.* 3. cited by *Crompton*, that in an indictment before the coroner *ſe defendendo*, the words *ſe defendendo* were void and ſtricken out, is not becauſe they were againſt the king, but becauſe they were too general. [130]

2 *Co. Inſtit. ſuper Stat. Glouc. cap.* 9. *p.* 316. an indictment *ſe defendendo* is good before juſtices of gaol-delivery, but it is there ſaid it is not good before juſtices of peace; *de quo ſupra*, *p.* 45. and therefore upon ſuch an indictment before the coroner *ſe defendendo* ſpecially, the juſtices of gaol-delivery may bail the party till the next ſeſſions to

procure his pardon of courſe, as well as if it had been found upon his trial; and ſo it was done 26 *Eliz.* in *Holmes*'s caſe, *Crompt.* 153. *b.* *vide Ap-Rice*'s caſe, 19 *H.* 7. *Kelw.* 53. *a.* *Crompt. ibidem.*

2. If a man be convicted of manſlaughter, and hath a pardon to plead, which the juſtices of gaol-delivery ſee in the interval of the ſeſſion, they may bail him, (notwithſtanding his conviction and that of manſlaughter), to another ſeſſion to plead his pardon. 2 *E.* 6. *B.* *Mainpriſe* 94. *Crompt.* 153 *b.*

3. If a perſon be brought before the judges of gaol-delivery upon ſuſpicion of murder, but before commitment or indictment [it appears] upon examination of the fact by the juſtices of gaol-delivery, that he is not guilty, (tho in truth a felony were committed), the juſtices of gaol-delivery may bail him to another ſeſſions: *vide* 31 *Eliz.* *in caſe de Salford*, *Crompt.* 154. *a.*

But I am not of the mind that the ſame judge [*Shuttleworth*] was of that if he be convict upon a trial againſt the opinion of the judge, that he can bail him to ſue his pardon; but all he may do is to reprieve him before judgment, and certify for him for a pardon.

And therefore it ſeems to me there is no difference between this caſe and that of *Dyer* 179. *a.* where a man is convict, and it [131] is doubted whether he be within clergy, yet he remaineth not bailable.

4. If a man be indicted of murder at the ſeſſions of gaol-delivery, and prays his trial, but the proſecutor for the king is not ready with all his evidence, the judge may reſpite his trial till another ſeſſions; and tho he be not bound to bail him, yet if he do find that it is no contrivance of the priſoner to ſurpriſe the proſecutor, but that it is merely the neglect of the proſecutor, or that his pretenſe is merely a delay to continue the party in priſon, I have known it often practiſed at *Newgate*, and elſewhere, for the juſtices of gaol-delivery to bail the priſoner till another ſeſſions, if it be far off, and upon circumſtances conſidered.

And yet in none of theſe caſes neither juſtices of peace nor ſheriff can bail; but how far they may bail in caſes of manſlaughter ſhall be ſaid hereafter, when we conſider the ſubſequent ſtatutes.

And thus far at preſent for bailing in caſe of the death of a man.

2. The *ſecond* caſe where a man was not bailable by the common law, is, where a man is taken *per mandatum domini regis*: this is not intended of the perſonal command of the king, for regularly as the king

king cannot in perſon arreſt or impriſon, ſo he cannot command another to impriſon, but it muſt be done by ſome order, writ, or precept, or proceſs of ſome of his courts. 16 *H.* 6. *Monſtrauns de fait* 182. 1 *H.* 7. 4. *b.* 2 *Co. Inſtit. ſuper ſtatutum Weſtminſt.* 1 *cap.* 15. *p.* 187.

Nay, altho ſuch a mandate be by commiſſion under the great ſeal, it is void, 42 *Aſſiz.* 5. therefore the *præceptum*, or *mandatum domini regis* in this act, is intended of the proceſs of law iſſuing out of the king's courts according to their ſeveral juriſdictions, 2 *Co. Inſtit. ſuper Mag. Chart. cap.* 29. and *Weſtm.* 1. *cap.* 15. But if intended of the king's perſonal command, tho ſuch a perſon ſo taken be not bailable by the common writ *de homine replegiando*, yet he is bailable by the court of king's bench or chancery upon an *habeas corpus*; *de quo infra*, 2 *Co. Inſtit. p.* 55. 187.

3. *Thirdly*, *Or of the juſtices*, *viz.* by writ of proceſs iſſuing according to law within their ſeveral juriſdictions; [132] for altho theſe were bailable in many caſes by the courts that iſſued the proceſs, yet they were not bailable by the common writ *de homine replegiando*, but are excepted therein, nor by the ſheriff *virtute officii* till the ſtatute of 23 *H.* 6. *cap.* 10.

4. *Fourthly*, *Or for the Foreſt*; perſons impriſoned by the juſtice in *eyre* in the foreſt, are not repleviſable by the common writ *de homine replegiando*.

II. The ſecond part of this ſtatute is enacting or declarative who are not bailable; but ſo far as this ſtatute looks, it only concerns the ſheriff and bailiffs, and the common writs of *homine replegiando*, or *de manucaptione*, which are directed to the ſheriff, tho afterwards it was made the rule in many things to juſtices of peace, &c. by the ſtatutes of 1 & 2 *P.* & *M.* and 2 & 3 *P.* & *M. de quibus infra.*

And the caſes wherein bail is reſtrained by this ſtatute, are thirteen in number, ſome in reſpect of the heinouſneſs and weight of the offenſe, as treaſon, burning of houſes, breaking of priſon, &c. and the reſt upon the great evidence and probability of guilt, as perſons outlawed, &c. but I ſhall follow them in the order that the ſtatute ſets them down.

1. Perſons outlawed; for outlawry is an attainder of felony, and [the outlaw] is preſumed guilty, becauſe he withdraws himſelf from the proceſs of law.

And upon the ſame reaſon it is, that a perſon convict of felony, while the judge adviſeth upon his clergy, is not bailable, becauſe he is convicted,

convicted, *Dy.* 179. *a.* Nay, tho he be convicted againſt the direction of the court, he is not bailable againſt the opinion of *Shuttleworth*, 31 *Eliz. Crompt. f.* 154. *a.*

And therefore if the ordinary had had a clerk convict in his cuſtody, if the ordinary let him to bail, he was puniſhable: *vide* 15 *H.* 7. 9. *a.*

But if a man be outlawed for felony, and be taken upon a *capias utlegatum*, and plead in avoidance of the outlawry againſt him that he is of another place, and ſo not the perſon outlawed, or bring a writ of error to reverſe the outlawry and aſſign his errors, the court [133] of king's bench may bail him; and it is not unuſual ſo to do, whether the outlawry be upon an appeal or an indictment.

If a man be indicted or appealed for ſuch an offence, wherein bail may be taken, the indictment or appeal does not hinder his bailment, becauſe it induceth no ſufficient preſumption of his guilt; if he were bailable before indictment, he is bailable after, 2 *Co. Inſtit. ſuper ſtat. Weſtm.* 1. *cap.* 15. and *ſtatutum ipſum F. N. B.* 249. 22 *Aſſiz.* 94. but not allowed till he hath pleaded to the indictment, 16 *Aſſiz.* 13. 29 *Aſſiz.* 44.

But if a man be indicted before juſtices of a higher juriſdiction, as before juſtices of *oyer* and *terminer*, he cannot be bailed by juſtices of peace, for they cannot proceed upon an indictment taken before ſuperior judges, tho otherwiſe the cauſe might be within their cognizance.

2. Perſons that have abjured for felony, are not bailable, for they are attainted in law.

3. Approvers in felony are not bailable, becauſe they do confeſs themſelves guilty.

4. Perſons taken with the *mainouvre* are not bailable, becauſe it is *furtum manifeſtum*.

But that is intended of the thief himſelf; for if *A.* ſteal goods, and ſells them to *B.* and *B.* is taken with them, *B.* is bailable.

5. Perſons that being committed for felony break priſon, are not to be bailed; for, 1. It carries a preſumption of their guilt. 2. It is a ſuperadded felony to the former, for which they ſtood committed.

6. Notorious thieves: and herein common fame, and other circumſtances may be oppoſed againſt their bailing, unleſs they can ſhew reaſonable evidence to prove their innocence. 16 *E.* 4. 5. *a. b.*

7. Perſons impeached and approved by an approver, becauſe it induceth a ſtrong ſuſpicion that they are guilty, becauſe the accuſer confeſſeth himſelf guilty before he can impeach others. But

But this hath certain exceptions. 1. If the approver be dead. 2. If the approver hath waved his appeal. 3. If the perſon accuſed by the approver be of good fame.

8. Perſons arreſted for wilful burning of another man's houſe, which was a felony at common law.

9. Perſons arreſted for falſifying the king's coin.

10. Or for counterfeiting the king's great or privy ſeal.

11. He that is excommunicated by the ordinary, is not bailable, unleſs it be for a temporal cauſe; and then upon a prohibition granted, he may not only be bailed but delivered; or upon an appeal and a ſpecial writ *de cautione admittendâ*, if not obeyed by the ordinary, a ſpecial writ may iſſue for his enlargement.

12. Or if he be impriſoned for ſome open miſdeed, as if *A.* dangerouſly wounds *B.* he may be impriſoned till it be known whether the party will die or live; and regularly is not to be bailed, till it ſhall probably appear that the danger is over. 10. *H.* 7. 20. *a.* 3. *H.* 7. *cap.* 1.

13. Nor he that is arreſted for treaſon, that toucheth the king, whether he be indicted or not; theſe are neither bailable by virtue of the common writ *de homine replegiando*, nor *ex officio* by the ſheriff or bailiff of a liberty.

But all or any of theſe are bailable by the court of king's bench. 2 *Co. Inſtit.* 189.

III. The third thing provided by this ſtatute, is to declare who are bailable by the ſheriff, and they are of ſeven kinds.

1. Perſons indicted before the ſheriff for larceny, if they have not been accuſed of other felonies before, or as the writ of the regiſter, *f.* 83. *b.* 268. *b.* ſtyles them, if they are of good fame.

This therefore lies very much in the diſcretion and true information of the ſheriff, or other juſtices that commit them.

2. Perſons impriſoned for a light ſuſpicion, *dum tamen fuerint bonæ famæ.*

3. Perſons indicted for petit larceny.

4. Perſons accuſed for receiving of felons.

5. Or of commandment, force, or aid to the felony done.

Theſe two laſt concern acceſſaries *after* and *before*, wherein there is ſome diverſity of opinion in our books. [135]

Regularly in all caſes of felony, tho it be murder, the acceſſary is bailable till the principal be attaint, and this holds as well in caſes of

the death of a man as other felonies, 40 *E.* 3. 42. *a.* 40 *Aſſiz.* 8. But if the principal be once attaint, and then the acceſſary is taken, he ſhall not be bailed until he hath pleaded to the indictment; but after plea pleaded by him, he ſhall be bailed, notwithſtanding the attainder of the principal, tho it be in caſe of murder. 43 *E.* 3. 17. *b.* 50 *E.* 3. 15. *a.* 27 *Aſſiz.* 10. 47 *Aſſiz.* 16.

6. Or indicted or accuſed for an offenſe, for which he ought not to loſe life or member, unleſs in caſes of offenſes againſt acts of parliament, where the acts of parliament exclude bail.

7. Or appeald by an approver, who is ſince dead.

Theſe be the caſes wherein by *that* act the party is bailable.

And therefore though a party be committed, and the tenor of the *mittimus* be to detain him without bail or mainpriſe, yet if the offenſe be by law bailable, he that hath the power of bailing may bail him. *Crompt. de Paee* 153. *a.*

This ſtatute adds a penalty, 1. For bailing a perſon not bailable; if he be a ſheriff, conſtable, or bailiff of fee, he ſhall loſe his office; and if he be an under-bailiff, or not a bailiff of fee, he ſhall have three years impriſonment, and be fined at the king's pleaſure. 2. And if he ſhall detain perſons repleviſable after ſurety offered, he ſhall be grievouſly amerced.

And thus far for the ſtatute of 3 *E.* 1.

Burn. Tit. Bail per totum. Index to 2 Hawk. P.C. Tit. Bail. 4 Black. Com. ch. 22. Of Commitment and Bail, 296—300.

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[136] CHAP. XVI.

Concerning the ſtatutes of 34 E. 3. 1 R. 3. 3 H. 7. 1 & 2 P. & M. 2 & 3 P. & M. *in relation to* bailment of priſoners.

ANTIENTLY moſt of the buſineſs touching bailment of priſoners for felony or miſdemeanors was performed by the ſheriff or ſpecial bailiffs of liberties, either by writ, or *virtute officii*.

But when the offices of juſtices of peace were inſtituted by the ſtatute of 1 *E.* 3. they gradually had the greater buſineſs of committing and bailing offenders devolved into their hands; and by ſucceſſive acts of parliament.

1. The

1. The power of the ſheriff grew out of uſe. 2. The juſtices of peace obtaind moſt of the ſheriff's power in relation to bailment. 3. Their power of bailment is in relation to offenſes extended larger than the ſheriff's, and in ſome kind larger than the limits preſcribed by 3 *E.* 1. 4. Yet in ſome reſpects the ſheriff's power as to bailing in offenſes not capital was enlarged by the ſtatute of 23 *H.* 6. *cap.* 10.

I ſhall therefore take theſe ſeveral ſtatutes in order of time.

I. The ſtatute of 34 *E.* 3. *cap.* 1. gave them power to apprehend malefactors, and to commit them to cuſtody, or to bind them to their good behaviour, which was not intended perpetual, but in nature of bail, *viz.* to appear at ſuch a day at their ſeſſions, and in the mean time to be of good behaviour.

By the ſtatute of 23 *H.* 6. *cap.* 10. there is not only power, but command to the ſheriff to let out by ſufficient ſureties parties arreſted in perſonal actions, and upon indictments of treſpaſs, (except perſons taken by *excommunicatio capiendo*, condemnation, judgment, execution, ſurety of the peace, or by commandment of the juſtices, or perſons taken upon the ſtatute of labourers), yet [137] their power of bailing of felons, *&c.* by the ſtatute of 3 *E.* 1. continued.

II. By the ſtatute of 1 *R.* 3. *cap.* 3. "Foraſmuch as perſons have "been taken and impriſond upon ſuſpicion of felony, ſometimes up- "on light ſuſpicions, ſometimes by malice, and detaind without bail or "mainprize, it is enacted, that every juſtice of peace within their limits "have power to let ſuch priſoners to bail, as if they had been in- "dicted before them at their ſeſſions, and ſhall have power to in- "quire of eſcapes."

This gave power to any one juſtice of peace to bail any priſoner for felony, and excepts not manſlaughter, but withal ſuppoſeth, that before this act they could not bail till indictment in their ſeſſions; but it ſeems was ſomewhat uncertain, for it was, *where they were committed for malice or light ſuſpicions.*

III. The ſtatute of 3 *H.* 7. *cap.* 3. reciting the ſtatute of 1 *R.* 3. and that by colour thereof divers perſons not mainpernable were let to bail, enacts, "That two juſtices of the peace, whereof one of the "*quorum*, have power to let ſuch perſons as are mainpernable by "law, to bail to the next ſeſſions of the peace or gaol-delivery, and "ſhall accordingly return the recognizance under pain of 10 *l.*

This ſtatute ſeems, 1. To repeal the ſtatute of 1 *R.* 3. as to bailing by one juſtice, and gives it to two juſtices, whereof one of the *quorum*. 2. It limits alſo the power of bailment only to ſuch caſes as are bailable by law; and therefore, it ſeems, takes *in* the ſtatute of 3 *E.* 1. as the directory what perſons are by law bailable. And thus it ſtood till 1 *Mar.*

IV. By the ſtatute of 1 & 2 *P. & M. cap.* 13. theſe two things are principally enacted.

1. That whereas the ſtatute of 3 *H.* 7. is general, that two juſtices ſhall let to bail ſuch as are bailable by law, this ſtatute in expreſs words makes the ſtatute of 3 *E.* 1. the ſtandard for the taking of bail by two juſtices.

[138] 2. That any perſon arreſted for manſlaughter, or other felony bailable by law, or ſuſpicion thereof, ſhall not be bailed but by two juſtices of peace, whereof one of the *quorum*, both to be preſent at the bailing of ſuch offender, and to certify it in writing at the next gaol-delivery; but the juſtices of peace and coroner in *London* [and the county of *Middleſex*, and in other cities, boroughs, and towns corporate within their ſeveral juriſdictions] to do as formerly: juſtices of peace, *&c.* offending contrary to the true intent of this act, the juſtices of gaol-delivery may fine them.

V. The ſtatute of 2 & 3 *P. & M. cap.* 10. only provides for examinations and informations to be taken by the juſtices of peace, as well upon commitment as bailing of any priſoner for manſlaughter, or other felony.

Upon theſe ſtatutes, and that of 3 *E.* 1. which expreſly ſaith, "That *for the death of a man* (*) a perſon is not bailable by law," it hath been queſtiond, whether juſtices of peace may bail in caſe of manſlaughter.

On the one ſide, the ſtatutes of 2 *Mar.* and 3 *Mar.* expreſly admit that they may, and accordingly the uſual practice hath been: *vide Lamb. Juſtice, p.* 25. *& ſequentibus.*

On the other ſide, theſe things make againſt their bailing, *viz.* 1. The ſtatute of *Weſtm.* 1. [3 *E.* 1.] *cap.* 15. recites expreſly, that for the death of a man the offender is not by law bailable, and the very ſtatute of 1 & 2 *P. & M.* refers to the ſtatute of 3 *E.* 1. as the rule and ſtandard for juſtices of peace to proceed by, in caſe of bailing.

(*) *Vide Glanvil, Lib.* xiv. *cap.* 1 & 3.

2. Again,

2. Again, the ſtatute of *Glouceſter*, *cap.* 9. (†) expreſly provides, "That he that kills a man by miſadventure, ſhall remain in priſon "till the coming of the juſtices in *eyre* or gaol-delivery, and then he "ſhall be tried;" and if in caſe of a death by *infortunium*, much more in caſe of a ſimple manſlaughter.

3. The writ of *homine replegiando* excepts the caſe of the death of a man from bail.

4. It was reſolved by all the judges of *England*, 7 *Car.* 1. that a man is not bailable for manſlaughter, as I had it from the book of the late chief juſtice *Hyde*, who accordingly did ſet a fine of 20*l.* upon a learned reader, being a juſtice of peace, and [139] now an antient ſerjeant at law for bailing a man in caſe of manſlaughter in the county of *Salop*, which I knew to be true; and this was approved by moſt of the judges that heard it.

To ſettle this buſineſs therefore I ſay,

1. That in caſe of murder it is of all hands agreed, that the juſtices of peace cannot bail, but it is to be done regularly only in the king's bench.

2. That in caſe of manſlaughter, if the fact be apparent by plain proof or confeſſion that a man is kild, and kild by *J. S.* whether the ſame were done *ex malitiâ præcogitatâ*, or upon a ſudden falling out, or but *ſe defendendo*, yet a juſtice of peace, or two juſtices, whereof one of the *quorum* cannot bail by any law in force.

3. That whether it do *conſtare de perſonâ occidentis*, or *de modo occidendi*, or not, yet if the party be indicted of manſlaughter, nay tho it were but *ſe defendendo*, the juſtices of peace cannot bail.

4. But if there be a manſlaughter committed, and it is certainly no more, and a party ſuſpected is brou ht before two juſtices of the peace, whereof one is of the *quorum*, if the matter be doubtful and uncertain, whether this be the perſon that did the fact, the two juſtices of peace, whereof one is of the *quorum*, may bail *that* man, and that by virtue of the ſtatute of 1 *R.* 3. *cap.* 3. which gave power to one juſtice of peace generally to bail any perſon ſuſpect of felony, if it appear to him to be a light ſuſpicion, (whereof he muſt needs be the judge), which doubtleſs extended to manſlaughter; and altho the ſtatute of 3 *H.* 7. *cap.* 3. tranſfers that power to two juſtices of peace, whereof one of the *quorum*, yet ſtill it was bottomed upon the ſtatute

(†) 2 *Inſtit. p.* 315.

of

of 1 *R.* 3. and the ſtatute of 1 & 2 *P.* & *M.* is bottomed upon that of 3 *H.* 7.

Again, the ſtatute even of *Weſtminſter* 1. [*viz.* 3 *E.* 1.] tho it ſay *de morte hominis*, there is no bail at common law, yet it muſt be intended, when the offender is certainly known, for it generally provides, that perſons taken upon a light ſuſpicion ſhall be baild; and therefore the ſtatute of 1 & 2 *P.* & *M.* when it makes the [140] ſtatute of *Weſtminſter* 1. the ſtandard of their proceeding in point of bailment, and yet ſuppoſeth one taken for manſlaughter bailable, muſt mean ſuch a manſlaughter, where the party is [only] ſuſpected, not where the thing is done [by him]; for the words *bailable by law*, do not only refer to *felony*, which is the laſt antecedent, but *manſlaughter*: and by this conſtruction, all the ſtatutes, and all parts of the ſtatutes ſtand together *(e)*.

(e) Since our author wrote there has been another very material ſtatute in relation to bailment, *viz.* 31 *Car.* 2. *cap.* 2. commonly called the *habeas corpus* act. By this ſtatute, §. 7. "If any perſon committed for high treaſon or felony ſhall "pray on petition in open court the firſt "week of the term, or firſt day of the "ſeſſions of *oyer* and *terminer*, or general "gaol-delivery, to be brought to his trial, "and ſhall not be indicted ſome time in "the next term or ſeſſions after ſuch commitment, the court is required upon "motion made the laſt day of the term or "ſeſſions, to ſet at liberty ſuch priſoner "upon bail, unleſs it appears to the court "upon oath made, that the witneſſes for "the king could not be produced the "ſame term or ſeſſions. And if any perſon ſo committed having made his prayer or petition as aforeſaid, ſhall not be "indicted and tried the ſecond term or "ſeſſions after his commitment, or upon "his trial, ſhall be acquitted, he ſhall be "diſcharged from his impriſonment.

This act (which is related by biſhop *Burnet* in his hiſtory of his own times, *Vol.* I. *p.* 485. to have paſſed the houſe of lords in a very remarkable manner,) is generally eſteemed the great bulwark of *Engliſh* liberty, altho upon ſome important occaſions it has been thought proper, as to treaſon, to ſuſpend it for a time. See 6 *Ann. cap.* 15. 1 *Geo.* 1. *cap.* 8. & *cap.* 30. 9 *Geo.* 1. *cap.* 1.

CHAP. XVII.

Concerning the fourth general, *namely, the* various manner of *bailing priſoners.*

THE fourth thing comes to be conſidered, namely, the different manner of bailing of malefactors.

And this is of two kinds.

Firſt, By writ.

Secondly, *Ex officio* without a writ.

And

And, *firſt*, Concerning bail by writ.

And theſe are of four kinds. 1. *Homine replegiando.* 2. *Breve de manucaptione.* 3. *Habeas corpus.* 4. *De odio & atiâ.*

I. The writ of *homine replegiando* lies for any perſon impriſond for a miſdemeanor, wherein by the law he is bailable; and therefore in the writ there is an exception of the death of a man, perſons impriſond by the command of the king or his juſtices, or for offenſes of the foreſt, *vel pro aliquo alio recto, quare ſecundùm conſuetudinem* Angliæ *non ſit replegiabilis. F. N. B.* 66. *f.*

But tho offenſes in the foreſt are excepted, yet a ſpecial writ of *homine replegiando* lies for one taken by the miniſters of the foreſt (*nota*, not by the chief juſtice) *F. N. B.* 67. *a.*

So that this writ as to the point of bailing is founded upon the ſtatute of *Weſtm.* 1. *cap.* 15. or at leaſt governed by it, only in the ſtatute there the exception is of perſons taken by [command of] *the Juſtices*, here it is *capitalis juſticiarii.*

By this writ the ſheriff is to deliver the party by mainprife; and if he returns, that *J. S.* makes title to the perſon impriſond, either as his villain or ward, *&c.* he is to take ſureties of the party impriſond to appear in the king's bench or common-pleas, and to take bail of him for his appearance at the day, and to attach *J. S.* to appear at the ſame day, *&c.* where the buſineſs may be determind; and if *J. S.* be returned *non eſt inventus*, then a *capias in withernam* may be granted againſt him to take his body, and if a *non eſt inventus* be returned, a *withernam* to take his goods.

II. The writ of mainprife, and that is of two kinds, namely, 1. The general original writ *de manucaptione.* 2. Special writs of mainprife, both iſſuing out of the *Chancery.*

1. The general writs of mainprife are at large ſet down in the *Regiſt. f.* 268. *& ſeq.* and *F. N. B.* 250. *& ſequentibus*, and theſe writs ſeem to be grounded or directed alſo by the ſtatute of 3 *E.* 1. *cap.* 15. for *that* is the rule and direction whereby perſons are to be baild by this general writ; for no perſons criminal are bailable by this common writ of mainprife, for as ſuch they are bailable by that ſtatute; and this common writ of mainprife reſpects either ſuch as are committed by the ſheriff or bailiff of a hundred, or ſuch as, tho they are in the ſheriff's cuſtody, are yet committed to his cuſtody by others, as juſtices of the peace, *&c.* [142]

1. As

1. As to thoſe of the former kind, we muſt call to remembrance what hath been before ſaid touching the power of the ſheriff to take indictmments of felony, either by commiſſion or in his *Turn*.

The former power is repeald by the ſtatute of 28 *E.* 3. *cap.* 9. As to the latter, though the power of taking indictments continues in the ſheriff's *Turn*, yet by the ſtatute of 1 *E.* 4. *cap.* 2. they are to ſend them to the juſtices of peace to be determind in their ſeſſions; but the ſheriff nor his bailiffs are not to arreſt or attach any perſon thereupon; and the like law is for bailiffs of hundreds, who have a leet of the hundred or *Turn* accompanying it.

And therefore as to theſe, the writ of mainpriſe is conſequentially taken away, according to my lord *Coke*, in his comment *ſuper Weſtm.* 1. *cap.* 15. 2 *Inſtit. p.* 190.

But whereas it is there ſaid, that *by that ſtatute the writ of mainpriſe* generally *is taken away*, it is certainly miſtaken, for the writ of mainpriſe hath ſtill its uſe in caſes of perſons committed by the juſtices of peace, and ſome other caſes, as ſhall be farther ſhewn.

2. The *ſecond* ſort therefore of theſe common writs of mainpriſe, were for ſuch malefactors as were committed by others, if they were ſuch as by the ſtatute of *Weſtm.* 1. *cap.* 15. were bailable, and the writ of mainpriſe in this caſe continues in force and uſe to this day; as for inſtance, *F. N. B.* 250. *d.* for a perſon approved by an approver, if the approver is ſince dead; yet ſuch a perſon can neither be taken by warrant of the ſheriff or juſtice of peace, but by the coroner or juſtices of gaol-delivery.

F. N. B. 250. *g.* 251. *c.* for one indicted before the juſtices of peace for a treſpaſs, 250. *i.* for foreſtalling, 250. *e.* as acceſſary to a felony, where the principal is not attaint.

Again, *F. N. B.* 250. *f.* for one taken by the king's commiſſion for felony.

[143] And this is that writ that ſeems intended by the book of 14 *H.* 6. 8. *a.* where it is ſaid, "That he that is taken by "ſuggeſtion, as by juſtices of peace, *&c.* may be bailed without "writ; but he that is taken by a writ, muſt be bailed by writ (*);" which ſeems intended of this writ of mainpriſe; and tho the ſaying be not univerſally true at this day, for ſome that are taken by proceſs or writ may, at leaſt at this day, be bailed *virtute officii*, eſpecially upon the ſtatute of 23 *H.* 6. *cap.* 10. & *Weſtm.* 1. *cap.* 15. yet it

(*) See our author's note *ad F. N. B.* 66. *c.*

ſuf-

ſufficiently intimates, that the writ of mainpriſe was not taken away by 28 *E.* 3. *cap.* 9.

And thus far for the general writs of mainpriſe.

2. Special writs of mainpriſe were ſometimes granted upon ſpecial occaſions for thoſe, that were not bailable otherwiſe.

Thus it was uſual in antient times by the king's ſpecial warrant, ſometimes by ſpecial commiſſion, ſometimes by immediate writ out of *chancery* in times of war, to deliver perſons in priſon for felony upon mainpriſe to go into foreign parts in the king's wars, as *Gaſcoigne*, and elſewhere, at the king's wages, *& ſtabunt recti in curiâ*, after their return, *ſi quis verſus eos loqui voluerit*, and upon the return of ſuch manucaptions into the chancery to have charters of Pardon. See precedents of ſuch commiſſions and writs, *Pat.* 22 *E.* 1. *m.* 1. to *Roger Brabazun*, and *William Brereford*. *Rot. Vaſcon.* 22 *E.* 1. *m.* 8. *n°.* 11. *& m.* 12. *n°.* 4. for malefactors impriſond in all the gaols in *England* for felony and other crimes *per manucaptionem deliberand'*; and the like was often practiſed upon like occaſions in the reigns of other kings.

And thus far for writs of mainpriſe.

III. The third uſual writ for bailing of criminals, is by *habeas corpus*, and this is a writ of a high nature; for if perſons be wrongfully committed, they are to be diſcharged upon this writ returned; or if bailable, they are to be bailed; if not bailable, they are to be committed.

This writ iſſues out of the great courts of *Weſtminſter*, but hath different uſes and effects.

1. It may iſſue out of the court of *Common-pleas* or *Exchequer*; but that is or ought to be always where a perſon is [144] privileged, or to charge him with an action.

If a perſon is ſued in the common-pleas, or is ſuppoſed to be ſo ſued, and is arreſted for a pre-ſuppoſed miſdemeanor, yea or for felony, an *habeas corpus* lies in the court of *Common-pleas* or *Exchequer*; and if it appears upon the return, that the party is wrongfully committed, or by one that hath not juriſdiction, or for a cauſe for which a man ought not to be impriſond, the privilege ſhall be allowd, and the perſon diſcharged from that impriſonment; or if it be doubtful, he may be baild to appear in the court of *King's-bench*, which hath conuſance of the crime returned. *Coke Magn. Cart. cap.* 29. 2 *Inſtit. p.* 55.

And

And upon this account, *P.* 43 *Eliz. C. B.* in the caſe of *Bates* that was impriſond by the council-table, for not bringing in his ſubſcription to the *Eaſt-India* company, and this being returned upon the *habeas corpus*, together with a writ againſt him out of the common-bench, they adjudged the privilege to be allowd, and the party to be diſcharged *(a)*.

But if a man be ſued in the common-bench, and is arreſted and impriſond for felony, tho the gaoler, upon the *habeas corpus*, ought to return the cauſes, as well criminal as that wherewith he is charged out of that court, yet the court of common-pleas ought not to commit him to the *Fleet*, nor diſcharge him of the impriſonment, nor yet to take bail of him to anſwer there, for they have not conuſance of ſuch crimes; the like it is, if he be returned committed for a riot or ſurety of the peace by juſtices of peace; and therefore all they can do is to take his appearance, and take him to mainpriſe upon the action, and remand him as to the matter of crime, for which he was well committed by the juſtices, and to remand his body to the ſheriff's cuſtody upon his commitment for the crime. 2 *H.* 7. 2. *a.*

But now by the ſtatute of 16 *Car.* 1. *cap.* 10. they have an original juriſdiction to bail, diſcharge, or commit upon an *habeas corpus* for one committed by the council-table, as well as the king's bench, and that altho there be no privilege for the perſon committed.

[145]

2. As to the *King's-bench* and *Chancery*, they have an original power both to grant an *habeas corpus*, and to bail, or diſcharge, or remand, as the caſe requires, tho there be no privilege returned. *Coke* on *Mag. Cart. cap.* 29. 2 *Inſtit. p.* 55. but ſome things they differ in.

The *king's bench* in matters civil grant their *habeas corpus ad faciendum & recipiendum*, and this is done as well in vacation as term, and returnable before any particular judge of that court, or into the court itſelf.

And if there be returned even upon that writ any civil action, and alſo a matter of crime, as if a perſon be arreſted for debt, and alſo charged with a warrant of a juſtice of peace for felony; in that caſe, 1. If it appears to the judge or court, that the arreſt for debt or other

(a) See *Moor* 838. *& ſeq.*

civil

civil action is fraudulent, they may remand him. *Dyer* 249. *b. Harriſon's* caſe. 2. If it be found real, they may commit him to the king's-bench with his cauſes, tho they are matters of crime, for that court hath conuſance, as well of the crime, as of the civil action; but then in the term the court may take his appearance or bail to the civil action, and remand him, if they ſee cauſe, as to the crime to be proceeded on below.

But upon the writ *ad faciendum & recipiendum* there ought not ſingly a matter of crime to be return'd, for that belongs to the *habeas corpus ad ſubjiciendum*.

The other writ is the *habeas corpus ad ſubjiciendum*, which is for matters only of crime, and is not regularly to iſſue nor be returnable but in the term-time, when the court may judge of the return, or bail, or diſcharge the priſoner *(b)*.

Till

(b) By the ſtatute of 31 *Car.* 2. *cap.* 2. ſuch writ may iſſue in the vacation time on behalf of any perſon, who ſtands committed for any crime (unleſs for felony or treaſon plainly expreſt in the warrant of commitment, or as acceſſary before to any petit treaſon, or felony, or upon ſuſpicion thereof,) other than perſons convict or in execution; for by that ſtatute it is provided, "That if any ſuch perſon, or any one on "his behalf, complain to the lord chan- "cellor, or lord keeper, or any one of his "majeſty's juſtices either of the one bench "or of the other, or the barons of the ex- "chequer of the degree of the coif, and the "ſaid lord chancellor, &c. or any of them, "upon view of the copy of the warrant of "commitment or detainer, or otherwiſe "upon oath made, that ſuch copy was de- "nied to be given by ſuch perſon in whoſe "cuſtody the priſoner is detained, are "hereby authorized and required under "the penalty of 500*l.* upon requeſt made "in writing by ſuch perſon or any on his "behalf, atteſted and ſubſcribed by two "witneſſes, who were preſent at the de- "livery of the ſame, to award an *habeas "corpus* under the ſeal of ſuch court, "whereof he ſhall then be one of the "judges, to be directed to the officer in "whoſe cuſtody the party ſo committed "or detained ſhall be, returnable *immediatè* "before the ſaid lord chancellor or ſuch "juſtice, &c. and upon ſervice thereof, as "aforeſaid, the officer or his under officer "ſhall (within three days after ſuch ſervice, "if not beyond the diſtance of twenty "miles, or ten days, if above twenty "miles, and not beyond the diſtance of an "hundred miles, or twenty days, if above "the diſtance of one hundred miles), under "the penalty of 100*l.* bring ſuch priſoner "before the ſaid lord chancellor or ſuch "juſtice, &c. before whom the ſaid writ "is made returnable, and in caſe of his "abſence before any other of them, with "the return of ſuch writ and the true "cauſes of the commitment and detainer, "and thereupon, within two days after the "party ſhall be brought before them, the "ſaid lord chancellor, &c. before whom "the priſoner ſhall be brought, as afore- "ſaid, ſhall diſcharge him from his impri- "ſonment, taking his recognizance with "one or more ſureties in any ſum accord- "ing to their diſcretions, having regard to "the quality of the priſoner, and nature of "the offenſe, for his appearance in the "court of king's bench the term following, "or at the next aſſizes, &c. or in ſuch "other court, where the ſaid offenſe is "properly cognizable, as the caſe ſhall re- "quire, and then ſhall certify the ſaid writ "with the return thereof, and the ſaid re- "cognizances into the ſaid court, unleſs "it ſhall appear unto the ſaid lord chancel- "lor, &c. that the party ſo committed is "detained upon a legal proceſs, order, or "warrant out of ſome court, that hath ju- "riſdiction of criminal matters, or by "ſome warrant ſigned and ſealed with the "hand and ſeal of any of the ſaid juſtices, "or barons, or ſome juſtice of the peace "for ſuch matters or offenſes, for which by "law the priſoner is not bailable.

"No perſon to be intitled to the benefit "hereof, unleſs he firſt pay, or cauſe to be "paid or tendered the charges of bringing, "to be aſcertained by the judge or court "that awarded the writ, and indorſed "thereon,

Till the return filed the court may remand him, after it is filed the court is either to diſcharge, or bail, or commit him, as the nature of the cauſe requires.

[147] If together with the *habeas corpus* there iſſues a *certiorari* to remove the indictment, yet in caſe of felony, tho the body and record be returned and filed, the court may remand him and the record by the ſtatute of 6 *H.* 8. *cap.* 6. but in other caſes the record cannot be remanded, but they muſt proceed in the king's bench both to pleading, trial, and judgment.

But if the body be removed by *habeas corpus*, and the record alſo by *certiorari*, but the record not filed, tho the return upon the *habeas corpus* be filed, a *procedendo* may iſſue to the court below.

And thus far for the *habeas corpus* in the king's bench.

By virtue of the ſtatute of *Magna Charta*, and by the very common law, an *habeas corpus* in criminal cauſes may iſſue out of the *Chancery*. *Coke* on *Magna Charta*, *cap.* 29. 2 *Inſtit. p.* 55.

But it ſeems regularly this ſhould iſſue out of this court in the vacation time, but out of the king's bench in the term-time, as in caſe of a *ſuperſedeas* upon a prohibition. 38 *E.* 3. 14. *a. B. Superſedeas* 13.

When the cauſe is returned, the chancellor may judge of the ſufficiency or inſufficiency thereof, and may diſcharge or bail the priſoner to appear in the king's bench, or may *propriis manibus* deliver the record into the king's bench, together with the body, and thereupon the court of king's bench may proceed to bail, diſcharge, or commit the priſoner.

But if the chancellor ſhall not diſcharge him, but bail him, this ſurety muſt be to appear in the king's bench; or if the chancellor ſhall

" thereon, not exceeding 12*d.* *per* mile, " and give ſecurity by his own bond to pay " the charges of carrying back, if remanded " by the court or judge, and that he will " not make any eſcape by the way.

Is is further provided by this ſtatute, " That no perſon ſet at large upon any " *habeas corpus* ſhall be re-committed for " the ſame offenſe, but by order of court " having juriſdiction of the cauſe; any per- " ſon knowingly offending herein to for- " feit 500*l.*

" This writ to run into counties palatine " and privileged places.

" That no ſubject of *England* be ſent pri- " ſoner into *Scotland*, or any places beyond " the ſea, either within or without his " Majeſty's dominions, under the penalty " of a *præmunire*, except perſons ordered " to be tranſported, or offenders ſent to be " tried, where their offenſes were com- " mitted.

" That after the aſſizes proclaimed and " during the continuance thereof no pri- " ſoner be removed but before the judge " of aſſiſe in open court, nor at any other " time, but by *habeas corpus*, or other legal " writ, except where the priſoner is de- " livered to the conſtable, &c. to be carri- " ed to the common gaol; or where any " perſon is ſent by order of any judge of " aſſiſe, or juſtice of peace, to any com- " mon workhouſe or houſe of correction; " or is removed from one place to another " within the ſame county, in order for his " trial or diſcharge in due courſe of Law; " or in caſe of ſudden fire, infection, or " other neceſſity."

do

do neither, it ſeems he may commit him to the *Fleet* till the term, and then he may be turned over to the king's bench, and there proceeded againſt, for the chancellor hath no power to proceed in criminal cauſes.

And if the *habeas corpus*, and alſo a *certiorari* be granted, returnable in *Chancery*, and the cauſe and body be returned there, they may be ſent into the king's bench; if the body only be returned with his cauſes by *habeas corpus* into the *Chancery*, and delivered over into the king's bench, they may proceed to the determination of the return, and either by *procedendo* remand him, or grant a *certiorari* to certify the record alſo, and thereupon commit or bail the priſoner, as there ſhall be cauſe. [148]

But the ſending an *habeas corpus ad faciendum & recipiendum* by the chancellor for perſons arreſted in civil cauſes, eſpecially being in execution, is neither warrantable by law, nor antient uſage, and particularly forbidden by the ſtatute 2 *H.* 5. *cap.* 2. as to perſons in execution.

And thus far of bailing by *habeas corpus*.

IV. Touching the writ *de odio & atia* for a man accuſed of manſlaughter, in ſome places called a writ *de bono & malo* and *de ponendo ad ballium*, it is grounded upon the ſtatute of *Magna Charta*, *cap.* 26. repealed by 28 *E.* 3. *cap.* 9. and revived again, as is ſuppoſed, by 42 *E.* 3. *cap.* 1. whereby all acts made againſt *Magna Charta* are repealed. It is a writ much out of uſe, but the whole learning concerning it is put together by my lord *Coke* upon *Magna Charta*, *cap.* 26. 2 *Inſtit. p.* 42. and upon *cap.* 29. 2 *Inſtit. p.* 55. and thither I ſhall refer myſelf.

It has been diſuſed by reaſon of the great trouble in the attaining and execution of it, for, 1. There muſt be a writ to inquire *de vita & membris*. 2. There muſt be an inquiſition taken. 3. He was to be bailed by twelve perſons.

And now the juſtices of gaol-delivery uſually going their circuits twice a year, unleſs in the four northern counties, a priſoner comes to his trial as ſoon, if not ſooner, than ſuch inquiſition and mainprize can be taken.

And thus far of manucaption or bail by writ.

The *ſecond* general is bailing *virtute officii*.

The court of king's bench may *virtute officii* bail any perſon brought before them, of what nature ſoever the crime is, even for treaſon or murder, as hath been before ſhewn, *p.* 129.

Concerning bailment of felons by juſtices of the gaol-delivery and of the peace *virtute officii*, and the ſtatutes relating to them, enough hath been ſaid before.

The ſheriff, it ſeems, might *ex officio* without writ at common law bail offenders indicted before him in his *Turn*, or upon a commiſſion to him; but this power is in effect taken away from him in [149] caſes of felony, by the ſtatutes of 28 *E.* 3. *cap.* 9. and by the ſtatute of 1 *E.* 4. *cap.* 1. and 1 *R.* 3. *cap.* 3. transferred to the juſtices of the peace, as hath been before declared.

The marſhal of the king's bench took upon him antiently *virtute officii* to bail perſons indicted or appealed; but this is wholly taken from him by the ſtatute of 5 *E.* 3. *cap.* 8.

3 Wilſon. 172. 188.

CHAP. XVIII.

Concerning warrants to ſearch for ſtolen goods, *and* ſeizing *of them.*

I THOUGHT fit to inſert this buſineſs in this place. 1. Becauſe it is a buſineſs preparatory to the diſcovery of felons, and preparing evidence againſt them, and to the helping of perſons robbed to their goods. 2. Becauſe it is found by experience of great uſe and neceſſity, eſpecially in theſe times, where felonies and robberies are ſo frequent. And therefore this means of diſcovering of them is now grown common and uſual, much more than in antient times; and if it ſhould be diſuſed or diſcountenanced, it would be of public inconvenience; and therefore I can by no means ſubſcribe to that opinion of my lord *Coke*'s, 4 *Inſtit. cap.* 31. *p.* 176. as it is there generally ſet down, "That juſtices "of peace have no power upon a bare ſurmiſe to break open any man's "houſe to ſearch for a felon or ſtolen goods either in the day or "night." *(c)*.

The moderation and temperaments that are to be added to theſe warrants, are theſe:

[I. Touching the granting thereof.]

(c) Vide ſupra, p. 79, & 107.

1. They

1. They are not to be granted without oath made before the juſtice of a felony committed, and that the party complaining hath probable cauſe to ſuſpect they are in ſuch a houſe or place, and do ſhew his reaſons of ſuch ſuſpicion.

And therefore I do take it, that a general warrant to ſearch in all ſuſpected places is not good, but only to ſearch in ſuch particular places, where the party aſſigns before the juſtice his ſuſpicion and the probable cauſe thereof, for theſe warrants are judicial acts, and muſt be granted upon examination of the fact.

And therefore I take thoſe general warrants dormant, which are made many times before any felony committed, are not juſtifiable, for it makes the party to be in effect the judge; and therefore ſearches made by pretenſe of ſuch general warrants give no more power to the officer or party, than what they may do by law without them.

2. It is fit that ſuch warrants to ſearch do expreſs, that ſearch be made in the day-time, and tho I will not ſay they are unlawful without ſuch reſtriction, yet they are very inconvenient without it, for many times, under pretenſe of ſearches made in the night, robberies and burglaries have been committed (*), and at beſt it creates great diſturbance.

3. They ought to be directed to conſtables and other public officers, whereof the law takes notice, and not to private perſons, tho it is fit the party complaining ſhould be preſent and aſſiſtant, becauſe he knows his goods.

4. It ought to command, that the goods found, together with the party in whoſe cuſtody they are found, be brought before ſome juſtice of the peace, to the end that upon farther examination of the fact the goods and party, in whoſe cuſtody they are found, may be diſpoſed, as to law ſhall appertain.

And the reaſon is, tho the receiving of ſtolen goods doth not *ipſo facto* make a man an acceſſary to felony, tho he know them to be ſtolen (†), yet he carries with it a great preſumption, that the receiving of them was to aid the felon; and beſides, by the [151] examination of the receiver evidence may be gotten to diſcover the felon.

(*) *Vide Part* I. *p.* 553. *Co. P. C. p.* 64. *Kel.* 43.

(†) But now by 3 & 4 *W. & M. cap.* 9. & 5. *Ann. cap.* 31. whoever knowingly buys or receives ſtolen goods ſhall be taken as acceſſary to the felon. *Vide Part* I. *p.* 620.

II. Touching the execution of this warrant.

1. Whether the ſtolen goods are in the ſuſpected houſe or not, the officer and his aſſiſtants in the day-time may enter *per oſtia aperta* to make ſearch, and it is juſtifiable by this warrant.

2. If the door be ſhut, and upon demand it be refuſed to be opened by them within, if the ſtolen goods be in the houſe, the officer may break open the door, and neither the officer nor the party that comes in his aſſiſtance are puniſhable for it, but may juſtify it upon the general iſſue by the ſtatute of 7 *Jac. cap.* 5. ſo that *in eventu* it is juſtifiable by both, for it is a proceſs for the king, and includes a *non omittas*, and the very having of the goods carries a ſufficient ground *primâ facie* of ſuſpicion, that he was the felon that ſtole them, and may be thereupon juſtifiably arreſted.

3. If the goods be not in the houſe, yet it ſeems the officer is excuſed that breaks open the door to ſearch, becauſe he ſearcheth by warrant, and could not know whether the goods were there till ſearch made; but it ſeems the party that made the ſuggeſtion is puniſhable in ſuch caſe, for as to him the breaking of the door is *in eventu* lawful or unlawful, *viz.* lawful, if the goods are there; unlawful, if not there.

III. Now upon the return of this warrant executed, the juſtice, before whom it is returned, hath theſe things to do:

1. As touching the goods brought before him, if it appears they were not ſtolen, they are to be reſtored to the poſſeſſor; if it appears they were ſtolen, they are not to be delivered to the proprietor, but depoſited in the hand of the ſheriff or conſtable, to the end the party robbed may proceed by indicting and convicting the offender to have reſtitution.

2. As touching the party, that had the cuſtody of the goods.

If they were not ſtolen, then he is to be diſcharged.

If ſtolen, but not by him, but by another that ſold or delivered them to him, if it appears that he was ignorant that they were [152] ſtolen, he may be diſcharged as an offender, and bound over to give evidence as a witneſs againſt him that ſold them; if it appears he was knowing they were ſtolen, it is fit to bind him over to anſwer the felony, for there is a probable cauſe of ſuſpicion, at leaſt that he was acceſſary *after*.

☞ Burn. Title Search-warrant, per tot.

CHAP.

CHAP. XIX.

Concerning Preſentments, Inquiſitions, *and* Indictments, *and their kinds.*

I HAVE gone through thoſe matters, that are preparatory to the proceeding againſt malefactors in the ſeveral courts, wherein their offenſes are puniſhable, namely, the arreſt and impriſonment, or bailing of offenders, and the ſeveral juriſdictions, and juſtices, and miniſters of juſtice concerned therein.

That which follows to be conſidered is the manner of bringing the offender to his legal trial and judgment, which is either by appeal, which is the ſuit of the party, or by indictment which is immediately the king's ſuit.

The former of theſe, namely appeals, I ſhall conſider after the buſineſs of indictments, becauſe it is but rare to have an appeal, and the moſt proſecutions of this nature are by indictment or preſentment, and therefore I ſhall conſider this firſt.

I ſhall diſtribute this matter into theſe general heads, namely, 1. Touching indictments and preſentments. 2. Proceſs. 3. Arraignment. 4. Pleas of the offender. 5. Trial. 6. Judgment. 7. Execution. Each of which will take in ſeveral particular heads and diſtributions.

Preſentment is a more comprehenſive term than *indictment*, for regularly an indictment is an accuſation given *in* againſt a perſon by the grand inqueſt for ſome miſdemeanor whereunto he is put to anſwer; but preſentments do not only include ſuch indictments, but alſo ſome other informations whereunto the party is not put to anſwer, as preſentments of *felo de ſe*, of *fugam fecit*, of deodands, of deaths *per infortunium*, and many others. [153]

In this title concerning preſentments and indictments I ſhall conſider theſe points. 1. The ſeveral kinds of preſentments and indictments. 2. Where a man ſhall be put to anſwer in criminals without indictment. 3. Who may be indicters, and how returned. 4. Of what they may inquire. 5. What the penalty of not inquiring or preſenting. 6. What formalities are required in indictments.

Firſt, Touching the ſeveral kinds of preſentments, inquiſitions and indictments in matters capital.

They may be diſtinguiſhed, 1. In relation to the courts or judicatories, or juriſdictions, where they are made.

And, 2. In reſpect of their effects or natures.

I. Touching the former branch of diſtribution in relation to the juriſdictions where made, and *that* multiplies preſentments or indictments according to the juriſdictions, as ſome are in the leet, ſome in the ſheriff's *Turn*, ſome before the coroner, ſome before juſtices of peace, juſtices of *oyer* and *terminer*, gaol-delivery, king's bench, wh reof enough before hath been ſaid, and ſhall not need here to be repeated.

But thoſe, that moſt concern capital offenſes, are ſuch as are taken before the coroner, or ſuch as are taken before juſtices by commiſſion, whereof more ſhall be ſaid in the enſuing chapters

II. As to the ſecond kind of diſtribution in reſpect of the nature and effect thereof.

1. Some preſentments are of themſelves convictions, and not traverſable.

2. Others are not convictions, but only in nature of informations, and therefore traverſable.

Regularly all preſentments or indictments before juſtices of the peace, *oyer* and *terminer*, gaol-delivery, &c. are traverſable, and conclude not the party or thoſe claiming under him.

[154] And therefore, tho it hath been held, that the preſentment of a *felo de ſe* before the coroner be not traverſable, *(de quo ſupra,)* yet of all hands it is agreed, that a preſentment of a *felo de ſe* before juſtices of peace or *oyer* and *terminer* is traverſable by the executors, &c. *Co. P. C. cap.* 8. *p.* 55. *H.* 37 *Eliz. B. R. Laughton*'s caſe.

If a preſentment be made *ſuper viſum corporis*, that *A.* kild *B.* and fled, this preſentment of the flight is held not traverſable, but concluſive to forfeit the goods, tho he be after acquitted of the felony, and expreſly found by the petty jury upon his trial, that *non ſe retraxit (d)*, 13 *H.* 4. 13. *b. Forfeiture* 32. 3 *E.* 3. *Forfeiture* 35. 7 *Eliz. Dy.* 238. *b.* And the ſame law is, if it be found *ſuper viſum corporis*, that the felon fled and was kild in the flight, this preſent-

(d) *Vide ſupra, p.* 63, 64.

ment,

ment, tho after the party's death, is concluſive as to the forfeiture for the flight. 3 *E.* 3. *Coron.* 289, 290. 312.

But if before juſtices aſſigned to hear and determine, it be preſented, hat *J. S.* committed a felony and fled; or if upon the arraignment of a perſon for felony he be found not guilty, and that he fled, this is but in nature of an inqueſt of office, and the flight is traverſable in an action, or information, or *ſcire facias* brought by the king for the goods of the perſon; 37 *Aſſiz.* 7. 47 *E.* 3. 26. *a.* And all the reaſon, that can be given why the coroner's inqueſt of a *fugam fecit* is concluſive, and not the other, is only that which is given 8 *E.* 4. 4. *a. Ceo eſt un ancient poſitif ley del coron'.*

If a man be preſented to have ſufferd an eſcape, becauſe in this caſe the party is at leaſt to be fined, he ſhall have his traverſe to it, and is not concluded by it.

But if either before the juſtices in *eyre*, or before the coroner, an eſcape be preſented upon a vill either before or after the arreſt, this is held not to be traverſable, becauſe there is only an amercement to be ſet upon the vill, *viz. villata in miſericordiâ*; and the reaſon given by *Stamford* is, *quia de minimis non curat lex*; *Stamf. P. C. Lib.* I. *cap.* 32. *f.* 35. *b.*

But if it fall out, that there be an indictment for ſuch an eſcape, (as there hath been been formerly againſt the city of *London* for the eſcape of thoſe that riotouſly kild Dr. *Lamb (e)*, who were [155] thereupon fined 2000*l.*) ſuch an indictment is not concluſive, but traverſable.

Whether an inquiſition of a *felo de ſe* before the coroner be traverſable, *vide quæ ſupra, Part* I. *cap.* 31. *p.* 414.

And there are no preſentments beſides what are before mentiond, that are in themſelves convictions and not traverſable, but a preſentment in a leet of bloodſhed or the like, and in the *Swanimote* court of the foreſt for offenſes of *Vert* and *Veniſon*.

But even thoſe preſentments are traverſable alſo in two caſes, *viz.* 1. If the offenſe preſented be out of their juriſdiction. 2. Or if the preſentments be ſuch as concerns the freehold, as preſentments of nuiſances, or ſuch matters as charge the freehold; 41 *E.* 3. 26. *b.* 45 *E.* 3. 8. *b.*

And therefore it was reſolved in the *Exchequer* in a *quo warranto* againſt the water-bailiff and conſervator of the river *Severn*, 22 *Car.* 2.

(d) *Cro. Car.* 252.

that upon a bare preſentment the conſervators cannot ſet a fine upon a ſuppoſed unlawful fiſhing or the like, unleſs the party comes *in* and confeſſes it, or pleads to it, and be convicted by a jury of the offenſe.

A preſentment of a riot or forcible detainer by a juſtice or two juſtices of peace, as the caſe ſhall require, is a conviction by the ſtatute of 15 *R.* 2. *cap.* 2. 8 *H.* 6. *cap.* 9. 13 *H.* 4. *cap.* 7.

But a preſentment by a juſtice of a default in repairs of an highway, tho by the ſtatute of 5 *Eliz. cap.* 13. it is ſuch a preſentment as the parties ſhall be put to anſwer, yet it is not concluſive, but the traverſe of the party is ſaved by the ſtatute; and it is but reaſon, for tho the view of the juſtice can aſcertain the decay or want of repairs, yet it cannot aſcertain in what pariſh it lies, or who is bound by tenure or preſcription to repair.

Burn. Titles. Indictment & Preſentment. 4 Blackſ. Com. ch. 23. p. 301, 302—307. Index to 2 Hawk. P. C. tit. Indictment. Preſentment.

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[156] CHAP. XX.

Where a man ſhall be put to anſwer *in* criminal *and* capital offenſes without indictment *at the king's ſuit.*

AT the common law there were ſeveral means of putting the party to anſwer a felony without any indictment, ſome whereof are ſtill in force, others are taken away by ſtatute.

I. If a thief or robber were taken with the *mainouvre*, *cum manu opere*, and the *mainouvre* brought into court with the priſoner, he ſhould have been arraigned upon the *mainouvre* at the king's ſuit; 2 *E.* 3. *Coron.* 156. And therefore *M.* 18 & 19 *E.* 1. *coram rege*, *rot.* 28. *Norf. Et quia prædictus* Johannes de Brampton [*falſarius ſigilli regis & brevium ſuorum, ut dicitur,*] *non eſt appellatus, nec indictatus, nec captus cum manu opere, per quod ſecta domino regi in hujuſmodi caſu poteſt competere, ideò* [*conſideratum eſt, quòd*] *prædictus* Johannes [*eat inde*] *ſine die*, &c.

And *T.* 10 *E.* 2. *rot.* 132. *Bucks*, *Robert Legat* was arraigned for counterfeiting the king's ſeal, upon the counterfeit commiſſion brought

brought into court without indictment, and he pleaded not guilty, and was acquit (*).

But upon a bare information or bill, without indictment or the *mainouvre* at common law, no party was to be put to anſwer for a felony; and therefore, *M.* 20 & 21 *E.* 1. *coram rege, rot.* 27. *Hibernia, William Prene*, the king's carpenter in *Ireland*, being accuſed for felony by a bill in the king's-bench there, and convicted and condemned, but after ranſomed for 200*l.* and a writ of error brought in the king's-bench in *England*, and aſſigned, that he ought not to be put to anſwer in caſe of life or member *per vocem & per billam, quam* Nigellus le Broun, *porrexit versùs ipſum, licèt non eſſet indictatus per* 12. *(f)*. [149*]

But it ſeems to me, that this proceeding upon the *mainouvre* is wholly taken away by the ſtatutes of 25 *E.* 3. *cap.* 4. 28 *E.* 3. *cap.* 8. 42 *E.* 3. *cap.* 3. and therefore I do not find any proceeding upon the *mainouvre* ſince theſe ſtatutes.

II. A ſecond ſort of proceeding in caſes capital without indictment is, where an appeal is brought at the ſuit of the party, and the plaintiff is nonſuit upon that appeal, yet the offender ſhall be arraigned at the king's ſuit upon ſuch appeal; and ſo it is in caſe the appellant die or releaſe; and in ſuch caſe, altho the party be indicted as well as appeald, yet upon the nonſuit of the plaintiff, the pooceeding for the king ſhall not be upon the indictment, but upon the appeal. 4 *E.* 4. 10. *a.*

But this hath theſe two qualifications.

1. It muſt be where the plaintiff in the appeal hath either declared upon his appeal by writ, or formed his appeal by bill, for the bare ſuing of a writ without a declaration is not ſuch an appeal as, the party being nonſuit, the defendant ſhall be thereupon arraigned; for

(*) *Vide Part* I. *p.* 186 & 349.

(f) That caſe was thus: *William Prene* aſſigned for error that "par ceo que le "commune laie de *Engleterre*, e de *Ire-* "*laund*, veut, ke nul homme par bille "ſaunz enditement, ou par ſute de apel, "ſuz les plez de corone, ne ſait [ſoit] "attache, ne mis en reſpounz; yet that "he the ſaid *William* had been impriſond, "& *de diverſis feloniis acculpatus* par une "bille par *Nel le Broun* bote en mayns "des juſtices; altho par enqueſt, ne par "chapiter, ne fut endite." And upon conſideration of the whole matter the court of king's-bench in *England* were of opinion, "Quod prædictum recordum eſt "irritandum, & adnichilandum; & idcò "mandatum eſt capitali juſtic' *Hiberniæ*, "quòd corrigat, &c. & acceptâ ſecuritate "de prædicto *Willielmo* ad ſtandum recto "in com' ubi deliquiſſe debuit, & vocatis "ſuper hoc convocandis ponat prædictum "*Willielmum* per apertum & manifeſtum "indictamentum de certis feloniis in cer-"tis locis, ſi aliquis vel aliqui eum fortè "indictare ſive appellare voluerit ſecun-"dùm legem & conſuetudinem regni, &c. "& quòd interim per manucaptionem bo-"na & catella, terras & tenementa, eidem "*Willielmo* deliberet, &c.

1. The

1. The writ may be brought in his name by a ſtranger without his privity. 2. Becauſe the writ alone contains not ſuch certainty of time, place, and other matters, whereby the party may be put to anſwer. 7 *H.* 7. 6. *b.*

2. It muſt be where an appeal is well begun, and by a party enabled to proſecute it, therefore, if the appeal abates, becauſe a plaintiff is outlawed, or a woman (who cannot bring an appeal, but only
[150*] of the death of her huſband,) or if the year and day be paſt, or by the miſnoſmer of the defendant, *&c.* there the appellee ſhall not be arraigned at the king's ſuit, becauſe the appeal was never good, but ſhall be diſmiſſed, only the judges may arraign him upon an indictment, if any be before them for that offenſe, or if none be, yet they may bind him over to another ſeſſions, and in the mean time to be of good behaviour; 19 *E.* 2. *Coron.* 317. All the learning touching this buſineſs is fully declared by *Stamf. Lib.* III. *cap.* 59. *f.* 147. *& ſequentibus.*

III. A third ſort is upon an appeal by an approver, but the whole learning touching that will come in its proper place hereafter *(g)*.

IV. The fourth ſort is by appeals by particular perſons, eſpecially of treaſon in parliament; and this was very frequent in antient times, eſpecially in the time of *R.* 2. namely *anno ſeptimo, undecimo & duodecimo*, which bred great inconveniencies.

And therefore by the ſtatute of 1 *H.* 4. *cap.* 14. all theſe kinds of appeals in parliament are wholly taken away; and ſince that time I find not any ſuch appeals brought in parliament.

And therefore, when the now earl of *Briſtol*, in this preſent parliament, in the lords houſe preferd articles of high-treaſon and other miſdemeanors againſt the earl of *Clarendon*, then lord chancellor, upon a reference unto all the judges, and upon great conſideration the judges *unâ voce* returned their opinion, that theſe articles were contrary to the ſtatute of 1 *H.* 4. and could not be preferd in the lords houſe by the ſaid earl, or any other private perſon *(h)*.

But impeachments by the houſe of commons of high treaſon, or other miſdemeanors in the lords houſe have been frequently in practice, notwithſtanding the ſtatute of 1 *H.* 4. and are neither within

(g) Vide infra, cap. 29. *p.* 226. *(h)* See *Stat. Tr.* Vol. II. *p.* 550.

the

the words nor intent of that ſtatute, for it is a preſentment by the moſt ſolemn grand inqueſt of the whole kingdom.

V. If in a civil action *de uxore raptâ cum bonis viri*, upon not guilty pleaded, the defendant be convicted, this antiently ſerved in nature of an indictment of felony, 13 *Aſſiz.* 6. 18 *E.* 3. 32. *a. Stamf. P. C. f.* 94. *b.* So if upon a ſpecial verdict in treſpaſs brought in the king's-bench, it be found, that the de- [151*] fendant took them felonioufly, antiently this ſerved for an indictment. 31 *E.* 1. *Enditement* 31.

So if in an action of ſlander for calling a man thief, the defendant juſtifies that he ſtole goods, and iſſue thereupon taken, it be found for the defendant, if this be in the king's-bench, and for a felony in the ſame county where the court ſits, or if it be before juſtices of aſſize, who have alſo a commiſſion of gaol-delivery, he ſhall be forthwith arraigned upon this verdict as on an indictment, and the reaſon is, becauſe here is a verdict of twelve men in theſe caſes, and ſo the verdict, tho in a civil action, ſerves the king's ſuit as an indictment, and is not contrary to the acts of 25, 28, & 42 *E.* 3. which enact, *that no man ſhall be put to anſwer, &c. but upon indictment or preſentment.*

But if the ſheriff returns a reſcue of a priſoner taken for felony, 1 *H.* 7. 6. *a.* or a breach of priſon by one arreſted for felony, 2 *E.* 3. 1. *b.* this is not ſufficient to arraign the party, nor doth it countervail an indictment, for it is not by the oath of twelve men; *vide hoc totum, Stamf. P. C. Lib.* II. *cap.* 29. *f.* 95. *a.*

By the ſtatute of 11 *H.* 7. *cap.* 3. there was power given to proceed upon all penal ſtatutes by information before juſtices of aſſize and peace, but there is an exception of all caſes of treaſon, murder and felony.

Ill uſe was made of this ſtatute by *Empſon* and *Dudley*, and great inconvenience and trouble to the people did ariſe by it, and therefore by 1 *H.* 8. *cap.* 6. it was repeald.

And tho informations are practiſed oftentimes in the crown-office in caſes criminal, and by many penal ſtatutes the proſecution upon them is by the acts themſelves limited to be by *bill, plaint, information* or *indictment*, yet thus much is obſervable.

1. That the method of proſecution of *capital* offenſes is ſtill to be by indictment, except the caſes above mentiond.

2. That

2. That in all criminal cauſes the moſt regular and ſafe way, and moſt conſonant to the ſtatutes of *Magna Carta*, *cap.* 29. 5 *E.* 3. *cap.* 9. 25 *E.* 3. *cap.* 4. 28 *E.* 3. *cap.* 3. & 42 *E.* 3. *cap.* 3. is by preſentment or indictment of twelve ſworn men.

[152*] CHAP. XXI.

Who may be indictors, and where and how returned.

INQUISITIONS, preſentments, or indictments are taken before courts, or officers of ſeveral kinds, and accordingly by acts of parliament ſeveral things are preſcribed touching them.

I. Touching inqueſts before coroners: By the ſtatute of 4 *E.* 1. *De officio coronatoris*, the coroner is to iſſue his precept to four, five or ſix vills to appear before him at a certain day to make inquiry, this precept is directed to the conſtables of the vills, who accordingly give ſummons to a competent number of inquirers, twelve at leaſt *(i)*, and by them the inquiſition is made, when they have been ſworn and have heard their evidence upon oath taken before the coroner.

II. Touching inqueſts of felonies in leets and *Turns*. By the ſtatute of *Weſtminſter* 2. *cap.* 13. indictments in the ſheriffs *Turns* are to be by twelve at leaſt, and they are to ſet their ſeals to the inquiſitions, otherwiſe they are void *(k)*.

And by the ſtatute of 1 *E.* 3. *cap.* 17. which extends as well to leets as *Turns*, they are to be by indenture, one part to remain with the indictors, the other with the ſheriff or ſteward.

And by the ſtatute of 1 *R.* 3. *cap.* 4. no perſon ſhall be returned upon a pannel in the ſheriff's *Turns*, unleſs he hath 20*s.* *per ann.* of freehold, or 26*s.* 8*d.* of copyhold, and all indictments in the *Turn* taken otherwiſe ſhall be void.

But now by the ſtatute of 1 *E.* 4. *cap.* 2. the ſheriff cannot proceed upon any indictments for felony, or otherwiſe taken in his *Turn*, but muſt ſend them to the ſeſſions of the peace, and the juſtices there are to make proceſs and proceed thereupon.

(i) *Cobat's* caſe *ſupra*, *p.* 161. *in notis*. *(k)* 2 *Co. Inſtit. p.* 387.

But

But then there muſt be care taken, 1. That the indictments be of ſuch matters only, as are within the juriſdiction of the ſheriff's *Turn*, otherwiſe the juſtices may not proceed upon them, 4 *E.* 4. 31 *a.* 8 *E.* 4. 5. *b.* (*) and 2. That they be by indenture, and under the ſeals of the preſenters, according to the [153*] former ſtatutes.

III. Indictments taken in the county of *Lancaſter* before the ſheriff or juſtices againſt any perſon inhabiting out of the ſame county, or taken in any other county againſt inhabitants of the county of *Lancaſter*, ought to be by twelve men, and each indictor to have lands or tenements of the yearly value of 5*l.* by the ſtatute of 33 *H.* 6. *cap.* 2. (†).

IV. Touching murders, *&c.* committed in the king's palace, the ſtatute of 33 *H.* 8. *cap.* 12. hath appointed, that twenty-four of the king's yeomen officers of the cheque-roll of the king's houſe ſhall be returned to make inquiry, and the trial to be by a jury of the gentlemen officers.

V. Concerning inquiries to be made before juſtices itinerant, the courſe was this: There firſt went out the writ of the common ſummons of the *eyre*, directed to the ſheriff to ſummon *de quâlibet villâ quatuor homines & præpoſitum, & de quolibet burgo duodecim legales burgenſes*, to be at the day and place for the *eyre*, and upon that day the ſheriff and lords of liberties were to return the names of the bailiffs of their hundreds and liberties, and thoſe bailiffs were ſworn to elect two men in their ſeveral hundreds, and preſent their names to the court, and theſe two hundreders for each hundred were to chooſe of themſelves, and the reſt of their ſeveral hundreders reſpectively, ordinarily ſixteen, or ſometimes only twelve, who were ſeverally ſworn upon inquiries and preſentments of things done within their hundred, as ſo many grand inqueſts for every ſeveral hundred, and the twelve returned for each borough were the grand inqueſt for the borough; this cauſed a vaſt and chargeable attendance upon the courts in *eyre*, and hath been long diſuſed, and therefore I ſhall not ſay more of it.

VI. Concerning the chooſing and returning of the grand jury before juſtices aſſigned to keep the peace, *oyer* and *terminer*, and gaol-delivery, I ſhall be ſomewhat more large; becauſe, before theſe juſtices, ordinarily, criminal and capital cauſes are heard and determined.

(*) *Vide ſupra, p.* 71. (†) *Part* I. *p.* 286.

Upon

Upon the ſummons of any ſeſſion of the peace, there goes out a precept either in the name of the king, or of two or more juſtices of peace, directed to the ſheriff, that *non omittas propter aliquam libertatem in ballivâ tuâ, quin eam ingrediaris, & venire fac' tali die ac loco viginti quatuor liberos & legales homines de quolibet hundredo in ballivâ tuâ, tàm infra libertates, quàm extra, ad faciendum & exequendum ea quæ ex parte domini regis tunc & ibidem eis injungantur*, and a *ſcire fac'* to all coroners, conſtables, and bailiffs, &c. to be there at that day. *Lamb. Lib.* II. *cap.* 2.

And according to others, *Venire fac' viginti quatuor liberos & legales homines de quolibet hundredo in ballivâ tuâ, quorum quilibet habeat* 40s. *per ann. liberi tenementi ad minus, venire fac' etiàm viginti quatuor tàm milites quàm alios probos & legales homines de corpore com' tui, quorum quilibet habeat* 40s. *de terris & tenementis liberi tenementi, ad inquirend' ſuper iis, quæ ex parte domini regis ad tunc & ibidem eis injungerentur, præmunientes, omnes juſticiarios ad pacem, conſtabularios*, &c. Crompt. *f.* 212. *a.*

And in caſes of commiſſions of *oyer* and *terminer*, and gaol-delivery, *Quod non omittas propter aliquam libertatem, quin eam ingrediaris, & venire fac' tàm viginti quatuor probos & legales homines de quolibet hundredo com' prædict', ad inquirendum, præſentandum, faciendum & exequendum ea omnia, quæ ex parte domini regis tunc & ibidem eis injungerentur, quàm alios viginti quatuor probos & legales homines de com' prædict' ad faciend' juratam inter dominum regem & priſones prædictos*, &c. *Co. Entr. f.* 55. *a.*

Upon this precept the ſheriff is to return twenty-four or more out of the whole county, namely, a conſiderable number out of every hundred, out of which the grand inqueſt at the ſeſſions of the peace, *oyer* and *terminer*, or gaol-delivery, are taken and ſworn *ad inquirendum pro domino rege & corpore comitatûs*, (not as antiently in *eyre*, a kind of grand inqueſt out of every hundred); but in ſome counties, which conſiſt of gildable and ſuch franchiſe, where anciently ſeveral juſtices of gaol-delivery ſat, as in *Suffolk* (*), there are two grand juries, one for the gildable, another for the franchiſe, becauſe there are two ſeveral commiſſions of gaol-delivery.

[155*] Now touching the grand jury thus returned before juſtices aſſigned, there are ſome things conſiderable.

(*) *Vide ſupra, p.* 26.

They

They must be *probi & legales homines*, and therefore if any one of the indictors be outlawd, tho in a personal action, it is a sufficient plea to avoid the indictment; 11 *H.* 4. 41 *b. M.* 4 *Car. B. R. Croke*, *p.* 134, Sir *William Withipole*'s case, and the statute of 11 *H.* 4. *cap.* 9. hereafter mentioned fortifies this, *de quo infra.*

And therefore if any of them be attainted in a conspiracy, or *decies tantum*, or of perjury, or outlawd in any personal action, or attaint of felony, or in a *præmunire*, they are not to be indictors, because in law they are not *probi & legales. Lamb. Justic.* 391.

Touching their *annuus census*, I do not find any thing determined, but freeholders they ought to be. The statute of 2 *H.* 5. *cap.* 3. that requires jurors that pass upon the trial of a man's life, to have 40*s. per ann.* freehold, hath been the measure by which the freehold of grand jurymen hath been measured in precepts of summons of sessions (†).

By the statute of 11 *H.* 4. *cap. ultimo*, reciting, that inquests had been formerly returned of persons outlawd, fled to sanctuary for treason or felony, *&c.* enacts, "That no indictments be made by such "persons, but by inquest of loyal subjects returned by the sheriffs or "bailiffs duly, without denomination of any person, but only by the "sworn bailiffs and ministers of the sheriff; and if any indictment be "otherwise taken, it be void."

Upon this statute it hath been resolved in Sir *William Withipole*'s case, above cited. 1. That it extends to coroners inquests. 2. It is a good plea upon this statute, that one of the indictors is outlawd in a personal action, as well as of felony, or that any of the jurors were impanneld at the denomination of any, contrary to this statute.

By the statute of 3 *H.* 8. *cap.* 12. it is enacted, "That the justices "of gaol-delivery, and justices of peace, whereof one of the *quorum*, "in open sessions, may reform the pannels returned by the sheriff, "(which be not at the suit of the parties), by putting to, and "taking out the names of the persons returned, and shall [156*] "command the sheriff to return the same accordingly, upon pain of "20*l.* and the king's pardon to be no bar to the prosecutor."

This act extends not only to pannels of grand inquests returned, but also to pannels of the petty jury, commonly called the jury of life and death, which may be reformed by the justices according to this act, and the sheriff is bound to return the pannel so reformed.

(†) *Vide infra*, *p.* 272. *in notis.*

The

The grand inqueſt returned the firſt day of the ſeſſions, and ſworn, commonly ſerves the whole ſeſſions of the peace, *oyer* and *terminer*, or gaol delivery; yet the court may command another grand inqueſt to be returned and ſworn, which is done ordinarily upon two occaſions.

1. If before the end of the ſeſſions, the grand jury having brought *in* all their bills, are diſcharged by the court, and after that diſcharge, either ſome new felony, or other miſdemeanor is committed, and the party taken and brought into gaol; or if after the diſcharge of the grand inqueſt, ſome offender be taken and brought *in* during the ſeſſions. In the former caſe, there is a neceſſity to make a ſpecial record of the adjournment of the ſeſſions from day to day, becauſe otherwiſe the whole ſeſſions are in ſuppoſition of law only the firſt day, and therefore without the entry of ſuch adjournment, the offenſe and proceedings will be, in ſuppoſition of law, after the ſeſſions ended, and ſo the proceeding will be erroneous (*): this was the caſe of *Sampſon (h)*, who being arraigned and tried for a murder committed after the firſt day of the ſeſſions, and before the ſeſſions ended, for want of entry of an adjournment it was ruled erroneous. And the ſame is to be obſerved, if upon record it appears, that the grand inqueſt was returned after the firſt day of the ſeſſions, unleſs an adjournment be entered of record.

2. The ſecond ordinary inſtance of a new grand jury returned, is upon the ſtatute of 3 *H.* 7. *cap.* 1. namely, a grand inqueſt impannelled to inquire of the concealment of another grand inqueſt, upon which defaults preſented, the former grand inqueſt is to be amerced; and this, tho it mentions only an inqueſt thus to be taken by juſtices
[157*] of peace, yet it extends to the king's bench, and hath been practiſed there accordingly in my knowledge, and poſſibly at the ſeſſions of *oyer* and *terminer* and gaol-delivery, tho that can rarely come in queſtion, becauſe the ſeſſions of the peace ordinarily accompanies thoſe commiſſions.

And this is the proper and legal way of puniſhing the grand inqueſt, if they refuſe to preſent ſuch things as are within their charge, and for which they have probable evidence to make a preſentment; but of this more in the next chapter.

(*) *Supra*, p. 24. (*h*) *W. Jones*, 420.

See Index to 2 Hawk. P. C. tit. Indictors.

CHAP.

CHAP. XXII.

Concerning the demeanor of the grand inqueſt, *in relation to their preſentments.*

THE coroners inqueſt may, and muſt hear evidence of all hands, if it be offered to them, and that upon oath, becauſe it is not ſo much an accuſation or an indictment, as an inquiſition or inqueſt of office, *quomodo* J. S. *ad mortem ſuam devenit*, tho it be alſo true, that the offender may be arraigned upon that preſentment.

But the grand inqueſt before juſtices of peace, gaol-delivery, or *oyer* and *terminer*, ought only to hear the evidence for the king; and in caſe there be *probable* evidence *(a)*, they ought to find the bill, becauſe it is but an accuſation, and the party is to be put upon his trial afterwards.

But if a bill of indictment for murder, or other capital offenſe be preſented againſt *A.* if upon the hearing the king's evidence, or upon their own knowledge of the incredibility of the witneſſes they are diſſatisfied, they may return the bill *ignoramus*.

If *A.* be killed by *B.* ſo that it doth *conſtare de perſonâ occiſi & occidentis*, and a bill of murder be preſented to them, [158] regularly they ought to find the bill for murder, and not for manſlaughter, or *ſe defendendo*, becauſe otherwiſe offenſes may be ſmothered without due trial; and when the party comes upon his trial, the whole fact will be examined before the court and the petty jury, and in many caſes it is a great diſadvantage to the party accuſed (*). For if a man kills *B.* in his own defence, or *per infortunium*, or poſſibly in executing the proceſs of law upon an aſſault made upon him, or in his own defenſe upon the highway, or in defenſe of his houſe againſt thoſe that come to rob him (in which three laſt caſes it is neither felony nor forfeiture, but upon not guilty pleaded he ought to be acquitted), yet if the grand inqueſt find an *ignoramus* upon the bill,

(a) This ſame doctrine is laid down by C. J. *Pemberton*, in the caſe of the earl of *Shafiſbury*, *State Tr. Vol.* III. *p.* 415. *Vide tamen* Sir *John Hawles* remarks on that caſe, *State Tr. Vol.* IV. *p.* 183. wherein he unanſwerably ſhews, that a grand-jury ought to have the ſame perſuaſion of the truth of the indictment, as a petit jury, or a coroner's inqueſt: *vide ſupra*, *p.* 61.

(*) Notwithſtanding this, according to lord *Coke*, 9 *Co.* 119. *a.* indictments, which concern the life of a man, ought to be framed as near the truth as may be.

or find the ſpecial matter, whereby the priſoner is diſmiſſed and diſcharged, he may nevertheleſs be indicted for murder ſeven years after.

But if the grand jury had found the bill for murder (yea or for manſlaughter), and the party pleading not guilty, the ſpecial matter is given in evidence, and the petty jury find the ſpecial matter; (or in the three laſt caſes find him not guilty, as they may) this acquittal upon this finding will be a good plea of *autrefoits acquit*, and he ſhall never be arraigned for it again.

If a bill be againſt *A.* for murder, and the grand inqueſt upon the evidence before them, or their own knowledge be ſatisfied that it was but *per infortunium*, or *ſe defendendo*, and accordingly return the bill ſpecially, the court may remand them to conſider better of it, or may hear the evidence at the bar, and accordingly direct the grand inqueſt; but I have known a judge blamed for ſetting a fine upon the grand inqueſt for ſuch a return, becauſe in truth it comes not up to felony.

But if a bill goes out againſt *B.* for murder, and it doth *conſtare de perſonâ occidentis*, may the grand inqueſt find the bill for manſlaughter, and *ignoramus* for the murder? and is the court bound to receive ſuch a return?

[159] In this caſe, of all hands it is agreed *(b)*, that the grand jury is to blame, becauſe they take upon them to anticipate the evidence that is to be given to the petit jury, and ſo determine matter of law, which belongs to the court to determine, and by this means many murders may eſcape under the diſguiſe of manſlaughter, and ſo eſcape with their clergy.

Some therefore have made it a practice to ſet a fine upon the grand jury in this caſe, and it hath proceeded ſo far, as to fine petit juries alſo in ſuch like caſes; whereof hereafter.

That which I think herein, and in other concealments of grand inqueſts, is as follows, *viz.*

1. That the court may receive ſuch a return from the grand inqueſt, and it is a matter of diſcretion, eſpecially, if upon inquiry from the

(b) This is far from being agreed of all hands, for ſuch an anticipation of the evidence by the grand jury is what they cannot avoid, they being bound by their oath as much as the petit jury, to *preſent the whole truth, and nothing but the truth*; nor do they in this caſe ſo properly determine matter of law as matter of fact; for whether murder or not depends upon a preconceived malice, which (tho it is to be preſumed, where no provocation appears,) is matter of fact, and proper for the conſideration of a jury; and tho judges have ſometimes fined jurors for not finding ſuch bills for murder, yet ſuch proceedings have been generally cenſured, as in the caſe of Sir *H. Wyndham*, and others, *P.* 19. *Car.* 2. who were fined by *Keeling*, C. J. for not finding a bill of murder, albeit they were ſatisfied the man died by the hand of the party indicted; but upon complaint in parliament, the chief juſtice was fain to ſubmit. 2 *Keb.* 180.

indictors

indictors or witneſſes, or upon view of their examinations it doth plainly appear, that the crime amounts to no more.

2. That barely upon ſuch a return no fine can be ſet upon the grand inqueſt, unleſs the evidence to the grand inqueſt be given at the bar in the preſence of the court; for otherwiſe the court cannot underſtand, whether the grand inqueſt doth well or ill in ſuch caſe.

3. That if the evidence to the grand inqueſt be given at the bar upon an indictment in the king's bench, and the grand inqueſt will not find a bill according to the direction of that court; as for inſtance, will find a man guilty only *ſe defendendo*, or of manſlaughter, when it is murder, that court may ſet a fine upon the grand inqueſt, and ſo it hath been practiſed; for it is the higheſt court in *England* of ordinary juſtice, eſpecially in criminal cauſes.

4. That if the juſtices of *oyer* and *terminer*, or gaol-delivery having heard the evidence at the bar, the grand inqueſt will [160] not find according to their directions, the juſtices may bind them over by recognizance into the king's bench, and upon an information againſt them they may be fined.

5. That in ſuch a caſe juſtices of peace, *oyer* and *terminer*, or gaol-delivery may, according to the ſtatute of 3 *H.* 7. *cap.* 1. impanel another inqueſt to inquire of their concealments, and thereupon ſet fines upon them.

6. But in my opinion fines ſet upon grand inqueſts by juſtices of the peace, *oyer* and *terminer*, or gaol-delivery for concealments or non-preſentments in any other manner, are not warrantable by law; and tho the late practice hath been for ſuch juſtices to ſet fines arbitrarily, yea not only upon grand inqueſts, but alſo upon the petit jury in criminal cauſes, if they find not according to their directions, it weighs not much with me for theſe reaſons; 1. Becauſe I have ſeen arbitrary practice ſtill go from one thing to another, the fines ſet upon grand inqueſts began, then they ſet fines upon the petit juries for not finding according to the directions of the court; then afterwards the judges of *niſi prius* proceeded to fine jurors in civil cauſes, if they gave not a verdict according to direction even in points of fact; this was done by a judge of aſſize *(c)*, in *Oxfordſhire*, and the fine eſtreated; but I, by the adviee of moſt of the judges of *England*, ſtaid proceſs upon that fine; the like was done by the ſame judge in a caſe of burglary, the fine was eſtreated into the *Exchequer*; but by like advice

(c) Juſtice *Hide* at *Oxford*. *Virgb.* 115.

I ſtayed proceſs; and in the caſe of *Wagſtaff (d)*, and other jurors fined at the *Old-Bailey*, for giving a verdict contrary to direction, by the advice of all the judges of *England* (only one diſſenting), it was ruled to be againſt law: but of this hereafter *(e)*. 2. My ſecond reaſon is, becauſe the ſtatute of 3 *H.* 7. *cap.* 1. preſcribes a way for their fining, which would not have been, if they had been arbitrarily ſubject to a fine before. 3. It is of very ill conſequence, for the priviliege of an *Engliſhman* is, that his life ſhall not be drawn in danger without due preſentment or indictment, and this would be but a ſlender ſcreen or ſafe-guard, if every juſtice of peace, or commiſſioner of *oyer* and *terminer*, or gaol-delivery, may make the grand jury preſent what he pleaſes, or otherwiſe fine them; and there is no parity of reaſon or example between inferior judges and the court of king's bench, which is the ſupreme ordinary court of juſtice in ſuch caſes; and thus far concerning fining of grand inqueſts *(f)*.

[161]

They are ſworn to keep the king's counſel undiſcovered, the revealing or diſcloſing whereof was heretofore taken for felony, 27 *Aſſ.* 63. but that law is antiquated, it is now only fineable; if there be thirteen or more of the grand inqueſt, a preſentment by leſs than twelve ought not to be; but if there be twelve aſſenting, tho ſome of the reſt of their number diſſent, it is a good preſentment; for if twelve agree, it is not neceſſary for the reſt to agree. *Lamb. Juſtice* 400.

But in caſe of a trial by the petit jury, it can be by no more nor leſs than twelve, and all aſſenting to the verdict *(g)*, accordingly it was adjudged, *M.* 42 *E.* 3. *Rot.* 16. *Suff. Rex. (h)*, the judgment was reverſed, becauſe but eleven indictors.

But

(d) Vaugh. 153.

(e) Cap 42.

(f) The court of king's bench, it is true, may much more ſafely be truſted, than other inferior courts, but yet our author's arguments do ſufficiently evince, that no court whatever ought to have ſuch a power of making juries find what they pleaſe, nor has the law veſted ſuch a power in any court; for as to matter of fact, the jury are the ſole judges, and herein are to be guided entirely by their own judgments and conſciences; indeed in matters of law, the court is the proper judge, and the jury are not to find contrary to their direction; but even here they are not bound to follow the direction of the court, but if they cannot aſſent thereto, ought to find the fact ſpecially; indeed where the fact is agreed, if they will obſtinately find matter of law contrary to the direction of the court, there may be ſome reaſon why they ſhould be fined, See *Hood*'s caſe, *Kelyng* 50. but barely finding matter of fact againſt the direction of the court, is no ſufficient cauſe to fine a jury, *Buſhell*'s caſe, *Vaugh.* 153. and this diſtinction is founded on the antient maxim of the common law; *ad quæſtionem juris non reſpondent juratores, ſed judices; ad quæſtionem facti non reſpondent judices, ſed juratores.* Co. Lit. §. 366. & *libros ibi.*

(g) See the inconveniencies hereof, *Pref.* to *State Tr. p.* 7.

(h) This caſe proves nothing as to the petit jury, it being an indictment on the coroner's inqueſt, as appears by the record, which is as follows: "*John Cobat* of *Ipſ-*"*wich*, was indicted by the coroner's in-"queſt, conſiſting only of eleven, quòd die "Sabbati

But if a preſentment be delivered into a court of ſeſſions, and received, no amercement lies, that it was not aſſented to by twelve, but otherwiſe it is in caſe of a preſentment by a leet, for the party diſtrained, *&c.* may aver that it was not preſented by twelve. 45 *E.* 3. 26. *b. B. Leet* 7.

The indictors are preſumed in law to be indifferent, unleſs the contrary appear; 1. Becauſe returned by the ſheriff. 2. Becauſe ſworn by the court to preſent, and therefore ſhall never be charged by writ of conſpiracy for any conſpiracy before their being ſworn, tho the party be acquit. 7 *H.* 4. 31. *b.* 19 *H.* 6. 19. *a.* But 21 *E.* 3. 17. by *R. Th.* it is a good replication to ſay, he procured himſelf to be returned of the grand inqueſt.

If a bill of indictment be for murder, and the grand jury return it *billa vera quoad* manſlaughter, *& ignoramus quoad* murder, the uſual courſe is in the preſence of the grand jury to ſtrike out *malitioſe & ex malitiâ ſuâ præcogitatâ* and *murderavit*, and leave in ſo much as makes the bill to be but bare manſlaughter, and ſo to receive it.

But the ſafeſt way is to deliver them a new bill for manſlaughter, and they to indorſe it generally *billa vera*; for the words of the indorſement make not the indictment, but only evidence the aſſent or diſſent of the grand inqueſt, it is the bill itſelf is the indictment when affirmed. And ſo in like caſes, where the bill contains two offenſes, as burglary and theft, forcible entry and detainer. *H.* 4 *Jac. B. R. Yelverton* 99. *Ford*'s caſe.

The grand jury are ſworn *ad inquirendum pro corpore comitatûs*, and therefore regularly they cannot enquire of a fact [163] done out of that country for which they are ſworn, unleſs ſpecially enabled by act of parliament, but only in ſome ſpecial caſes. *Mich.* 9 *Car. B. R. Bell*'s caſe.

" Sabbati prox' ante feſtum Sancti Petri ad " vincula anno regni regis, *E.* 3. poſt con- " queſtum triceſimo quinto inſultum fecit " *Johanni le Swon* vivienti Prioris ſanctæ " Trinitat. *Gippewici* in ſuburbio libertat' " villæ prædictæ in quodam campo juxta " *Tromons' Hegg* & dictum *Johannem le* " *Swon* ibidem cum quadam armâ vocat' " *Sparth'* precii quatuor denar. verberavit " felon' de quâ quidem verberatione dictus " *Johannes le Swon* moriebatur, ſed lan- " guebat à dicto die Sabbati prox' ante feſ- " tum Sancti *Petri* ad vincula uſque ad diem " jovis tunc prox' ſequent;" the which indictment was afterwards in *Mich'* term *anno* 42 of the ſame reign removed into the king's bench, " & continuato inde proceſſu " verſus præfat' *Johannem* uſque à die Paſ- " chæ in xv dies anno regni regis nunc " *Angliæ* quadrageſimo tertio, ad quem " diem coram domino regi apud *Weſtm'* " venit prædictus *Johannes Cobat* per man', " & viſo & diligenter examinato per cur' " indictamento prædicto, pro eo quod " compert, eſt in eodem, quod fuerunt niſi " undecim juratores tantùm in inquiſitione " prædictâ, ubi in qualibet inquiſitione de " jure fore deberent xii jurati, & ſic vide- " tur cur', quod indictamentum prædictum " minus ſufficiens eſt ad præfat' *Johannem* " *Cobat* ulterius inde ponere reſponſur'. " Ideo idem *Johannes Cobat* ad præſens eat " inde ſine die, ſalvo ſemper jure regis, " &c."

If a man had been ſtricken in the county of *A.* and had died in the county of *B.* the offender had no been indictable of murder, *&c.* in the county of *A.* becauſe the death was in the county of *B.* neither had he been indictable in the county of *B.* becauſe the ſtroke was given in the county of *A.* but by the ſtatute of 2 *&* 3 *E.* 6. *cap.* 24. he may be indicted in the county where the party died, tho the ſtroke were in another county; and alſo the offender ſhall be tried there, but an appeal may be brought in either county. 7 *Co. Rep.* 2. *a. Bulwer's* caſe.

So if *A.* had committed a felony in the county of *D.* and *B.* had been acceſſary *before* or *after* in the county of *C. B.* could not have been indicted as acceſſary in either county at common law, but by that ſtatute he is indictable, and ſhall be tried in the county where he ſo became acceſſary. *Stamf. P. C. Lib.* I. *cap.* 46.

So if a ſtroke were given *ſuper altum mare*, and the party came into the body of the county, and there died, this is *caſus omiſſus*, and the party is neither indictable by the jury of the county where he died, nor before the admiral, by the ſtatute of 28 *H.* 8. *cap.* 15. *Co. P. C. cap.* 7. *p.* 48.

If *A.* robs *B.* in the county of *C.* and carries the goods into the county of *D. A.* cannot be indicted of robbery in the county of *D.* becauſe the robbery was in another county; but he may be indicted of larceny or theft in the county of *D.* becauſe it is theft wherever he carries the goods; the like law in an appeal, 4 *H.* 7. 5 *b.* 7. *Co. Rep.* 2. *a. Bulwer's* caſe.

But by the force of ſome acts of parliament, treaſons and felonies committed in one county may be indicted and tried in another county.

By the ſtatute of 33 *H.* 8. *cap.* 23. upon examination, as in that ſtatute is provided, treaſons, miſpriſions of treaſons, and murders committed in any place within the king's dominions, or without, may be enquired of, heard and determined, in any county where the king by his commiſſion ſhall appoint. [164]

This ſtatute, at leaſt as to the trial of treaſons and miſpriſions, is repealed by the ſtatute of 1 *&* 2 *P. & M. cap.* 10. *Stamf. P. C. Lib.* II. *cap.* 26. *fol.* 89, 90. *Co. P. C. cap.* 2. *p.* 27.

But it ſeems *that* ſtatute ſtands in force as to indictments and trials of murder, the circumſtances required by that ſtatute being obſerved.

By the ſtatute 35 *H.* 8. *cap.* 2. becauſe ſome doubt was conceived, whether foreign treaſons committed out of this realm might be enquired

of,

of, heard and determined within the realm, it is enacted, that ſuch offences ſhall be enquired of, heard and determined in the king's bench, or in ſuch counties where the king ſhall iſſue his commiſſion by the good men of the ſame county.

This ſtatute ſtands in force, not repealed by 1 & 2 *P. & M. cap.* 10. *Co. P. C. cap.* 2. *p.* 24.

By the ſtatute 27 *Eliz. cap.* 2. treaſons by prieſts or jeſuits coming into *England*, and felony for receiving them; and by the ſtatute 1 *Jac. cap.* 11. felony for taking a ſecond huſband or wife, the firſt living, are inquirable and determinable where the offender is apprehended; the like for felony in exportation of wools, by the ſtatute of 14 *Car.* 2. *cap.* 18. But yet it was held at common law, that treaſon in adhering to the king's enemies beyond the ſea, was inquirable and triable where the offender had lands, *vide Coke* ſuper *Littleton*, *Sect.* 440. *p.* 261. *b.* 5 *R.* 2. *Trial* 54. but this is now ſettled by the ſtatute of 35 *H.* 8. *cap.*2 *vide Co. P. C. cap.* 1. *p.* 11.

If *A.* by reaſon of tenure of lands in the county of *B.* be bound to repair a bridge in the county of *C.* if the bridge be in decay, he may be indicted in the county of *C.* that he is bound *ratione tenuræ* of lands in the county of *B.* to repair the bridge. 5 *H.* 7. 3. 3 *E.* 3. *Aſſiſe* 446.

4 Blackſ. Com. ch. 23. p. 303. Burn. tit. Jurors. Index to 2 Hawk P. C. tit. Jurors.

CHAP. XXIII. [165]

Concerning the forms of indictments in caſes capital, *and firſt touching the* form of the caption *returned upon a* certiorari.

IT will be a buſineſs of too much length, and beſides my intention to treat of all indictments in caſes of criminal, but I ſhall confine myſelf only to thoſe that are capital.

Touching the forms of indictments, there are two things conſiderable: 1. The caption of the indictment: 2. The indictment itſelf.

The caption of the indictment is no part of the indictment itſelf, but it is the ſtyle or preamble, or return that is made from an inferior court to a ſuperior, from whence a *certiorari* iſſues to remove; or when the whole record is made up in form, for whereas the record of

the indictment, as it ſtands upon the file in the court, wherein it is taken, is only thus: *Juratores pro domino rege ſuper ſacramentum ſuum præſentant*, when this comes to be returned upon a *certiorari* it is more full and explicite, *viz.* in this form:

Norff. *Ad generalem ſeſſionem pacis tent' apud* S. *in comit' prædicto 5 die Octobris anno regni, &c. 25 coram* A. B. C. D. *& ſociis ſuis juſticiariis domini regis ad pacem dicti domini regis in comit' prædict' conſervand', necnon ad divers' felonias tranſgreſs' & alia malefacta in eodem comitat' audiend' & terminand' aſſignatis, per ſacrament'* E. F. G. H. *&c. proborum & legalium hominum comit' prædict' jurat' & onerat' ad inquirend' pro dicto domino rege & pro corpore comit' prædict' exiſtit præſentatum.*

[166] 1 Firſt, The name of the county muſt be in the margin of the record, or repeated in the body of the caption.

2. The court where the preſentment is made, muſt be expreſſed, *viz. ad generalem ſeſſionem pacis, &c.* or *ad generalem goalæ regis deliberationem, &c.*

3. It muſt appear where the ſeſſion was held, and that the place where it was held is within the extent of the commiſſion, and therefore if *Dorſet* be in the margin, and the caption be *ad generalem ſeſſionem pacis tent' apud* S. and ſays not *in comitat' prædicto*, it is nought, *H.* 42 *Eliz. B. R. Ludlow*'s caſe, *Croke, n.* 10. *p.* 738. *P.* 40. *Eliz. B. R. Croke, n.* 4. *p.* 606. *Child*'s caſe; ſo if weſt-riding *in comit' Eborum* be in the margin, and caption be *apud* S. *in comit.' prædicto*, it ſhall be quaſhed, becauſe it doth not ſay *apud* S. *in* weſt-riding *in comitatû prædict' T.* 5 *Jac. B. R.* and *P.* 9. *Jac. B. R. Thorny*'s caſe, *Croke, n.* 6. *p.* 276.

4. The juſtices names, *H.* 42 *Eliz. B. R. Ludlow*'s caſe.

But it is not neceſſary to name all the juſtices by name, but the reſt may be ſupplied by the words *(& ſociis ſuis, &c.)* But ſo many are fit to be named as are enabled by their commiſſion to hold a ſeſſion, and the return of the caption is ſuppoſed to agree with the title of their ſeſſions.

5. The title of their authority, as *juſtic' ad gaolem domini regis com' prædict' deliberand'*.

And *note*, that if there be a ſeſſion by three commiſſions, as of gaol-delivery, *oyer* and *terminer*, and the peace, if it be returned at a

ſeſſion

ſeſſion holden before them, and the record be made up, as upon all three commiſſions, if they have juriſdiction to take the indictment but by one of thoſe, it is good, tho not enabled to take it by the other. 9 *H.* 7. 9. *a.*

Tent' coram juſticiariis ad pacem, without ſaying *necnon ad divers' felonias, &c. audiend' & terminand' aſſignatis*, is not good to remove an indictment, becauſe tho that clauſe be uſually added to all commiſſions of the peace, yet there are not thereby juſtices of *oyer* and *terminer*, and that clauſe ought to be added to their return, becauſe without that clauſe they cannot proceed by indictment. 22 *E.* 4. 12. *b.* 2 *R.* 3. 9. *a. b.*

And altho in all commiſſions of *oyer* and *terminer*, gaol-delivery, and of the peace, there be ſome that are of the *quorum*, without which there can be no ſeſſion held, yet in the caption there need not be any mention, whether any of them, or which of them are of the *quorum*, but generally as before, for it is ſufficient, if *de facto* the ſeſſion be held before him or them that are of the *quorum*, tho not ſo mentiond in the return, and ſo is the uſual courſe. [167]

But it ſeems, that if an act of parliament doth expreſly limit, that ſuch or ſuch an offenſe ſhall be heard and determined before two or more juſtices of the peace, *&c.* whereof one to be of the *quorum*, the caption of ſuch an indictment of ſuch an offenſe ought to mention, whereof *A. &c.* is of the *quorum*, as is uſed in the return of orders made by two juſtices touching baſtard children upon the ſtatute of 18 *Eliz. cap.* 3. becauſe the act of parliament preciſely limits one to be of the *quorum*, and therefore muſt be purſued.

6. It muſt return, that the indictment was made *per ſacramentum.*

7. It muſt name the jurors that preſented the offenſe, and therefore a return of an indictment or preſentment *per ſacramentum* A. B. C. & D. *& aliorum* is not good, for it may be the preſentment was by a leſs number than twelve, in which caſe it is not good. *H.* 41 *Eliz. B. R. Croke, n.* 16. *Clyncard's* caſe, *p.* 654. and it ſeems to me, that all the names of the jurors ought to be returned; for the party indicted may have an exception to ſome or one of them, as that he is outlawed, in which caſe the indictment may be quaſhed by plea, tho there be twelve beſides without exception; for poſſibly that one, who is not *legalis homo*, may influence all the reſt, and ſo vitiate the whole indictment.

8. They

8. They muſt be returned to be *probi & legales homines*, and *de comitatú prædicto*, and this holds as well in the caſe of the coroner's inqueſt, as of other indictments or preſentments. *P.* 20 *Jac. B. R. Croke* 2. *Oily*'s caſe, *p.* 635.

9. It ſeems requiſite alſo to add this clauſe, *onerati & jurati ad inquirendum pro domino rege & pro corpore comit' prædict'*; and if it be a preſentment by the grand jury of a liberty, *ad inquirend' pro domino rege & pro libertate de* S. *vel rapâ de* S.

[168]

10. If it concludes *qui dicunt*, and ſays not *ſuper ſacrament'*, *&c.* or *præſentatum exiſtit*, and ſays not *per ſacramentum*, *&c. præſentatum exiſtit*, it ſhall be quaſhed, for their preſentment muſt be upon oath, and ſo returned; ſo ruled *T.* 23 *Car.* 1. *B. R.*

And thus far for the caption of the indictment, where, *note* 1. That if the caption be faulty in the form, yet the ſame term it may be amended by the clerk of the aſſiſes, or the peace, but not in another term.

2. But in another term, the clerk that returns it ſhall be fined for his informal return.

CHAP. XXIV.

Concerning the body of the indictment *in caſes capital, and the* ſeveral parts *thereof, and the* forms *requiſite therein.*

THIS is a large and uncertain title, and hard to be reduced to any certain orders; 1. Becauſe the parts of an indictment are many. 2. The ſtrictneſs required in indictments is great, becauſe life is in queſtion. 3. Therefore very nice and ſlender exceptions have been of latter ages allowd, and they have been with too much facility quaſhed and reverſed. 4. The circumſtances of facts and crimes are very various.

Yet I ſhall endeavour to reduce this title to as much certainty, and as good a method as I can, confining myſelf to capital cauſes, tho there be many things that will ariſe equally applicable to cauſes of an inferior nature.

[169] An indictment is nothing elſe but a plain, brief, and certain narrative of an offenſe committed by any perſon, and

of

of thoſe neceſſary circumſtances, that concur to aſcertain the fact and its nature; and therefore I ſhall conſider 1. Some generals, that concern indictments in general. 2. I ſhall conſider the ſeveral parts of indictments in their order.

Among theſe generals theſe will come to be conſiderd, that follow.

I. Regularly, every indictment ought to be in *Latin*, as all pleadings in the courts of law ought to be, and it is of excellent uſe, becauſe it being a fixed, regular language, it is not capable of ſo many changes and alterations, as happen in vulgar languages. *(a)*

If there be a proper *Latin* word for any offenſe or thing containd in an indictment, it may not be ſupplied with general words, and an *Anglicè*.

Therefore an indictment, *quòd exercuit quaſdam diabolicis artes, Anglicè* witchcraft, was quaſhed, becauſe there is a proper *Latin* word for it; *viz. Incantatio. M.* 2 *Car. B.* Dr. *Lamb*'s caſe. *(b)*

Regularly, falſe *Latin* doth not vitiate an indictment, if yet the indictment be reaſonably intelligible, 5 *Co. Rep.* 121. *a. Long*'s caſe, *M.* 30 & 31 *Eliz. Croke, n.* 3. *B. R. Brickett*'s caſe, *(c)*, as *præfato reginæ*, where it ſhould be *præfatæ*.

But if the words be words of art, and by omiſſion or miſplacing of letters become inſignificant, they vitiate the indictment, as *burgariter* for *burglariter*, *feloniter* for *felonicè*, *murdredavit* for *murdravit*; but *burgulariter* hath been held good, 4 *Co. Rep.* 39. *b. Brook's* caſe, *ibid.* 41. *b. Haydon*'s caſe, 5 *Co. Rep.* 121. *a. Long*'s caſe, *H.* 43 *Eliz. B. R. Croke, n.* 15. *Ryle*'s caſe. *(d)*

So if it make the indictment inſenſible or uncertain, as if [170] *A.* and *B.* be indicted for ſtealing, *felonicè cepit & aſportavit*, where it ſhould be *ceperunt*, it ſhall be quaſhed, *P.* 42 *Eliz. B R. Lane*'s caſe *(e)*; ſo in an indictment of murder, the ſtroke laid *in ſiniſtro bracio*, where it ought to be *brachio*, for it appears not where the wound was, the words being inſenſible. *T.* 31 *Eliz. B. R. Webſter*'s caſe *(f)*

(a) This is now alterd by 4 *Geo.* 2. *cap.* 26. 6 *Geo.* 2. *cap.* 6. which requires all indictments, &c. to be in the *Engliſh* tongue; for notwithſtanding the excellency of the uſe here mentiond by our author, it was thought to be of much greater uſe and importance, that they ſhould be in a language capable of being known and underſtood by the parties concerned, whoſe lives and liberties were to be affected thereby.

(b) Noy 85. *Latch.* 156. *W. Jones* 143.

(c) Cro. Eliz. 108.

(d) Cro. Eliz. 920.

(e) Cro. Eliz. 754.

(f) By the name of *Gyſſen*'s caſe. *Cro. Eliz.* 137.

Ab-

Abbreviations, that are uſual, are allowable in indictments, as well as in other pleadings, and ſhall be conſtrued to the beſt advantage for the maintaining of the indictment, as if an indictment be maintainable upon one ſtatute or more, a concluſion *contra formam ſtatut. in hujuſmodi caſu edit. & proviſ.* ſhall be conſtrued ſingularly or plurally, as makes beſt for the maintenance of the indictment. *(g)*

Figures to expreſs numbers are not allowable in indictments, tho ſometimes literal numbers be allowable in returns, but in indictments the numbers, whether cardinal or ordinal, muſt be expreſſed in *Latin.*

II. An indictment grounded upon an offenſe made by act of parliament muſt by expreſs words bring the offenſe within the ſubſtantial deſcription made in the act of parliament, and thoſe circumſtances mentiond in the ſtatute to make up the offenſe ſhall not be ſupplied by the general concluſion *contra formam ſtatuti.*

And ſo it is, if an act of parliament ouſt clergy in certain caſes, as murder *ex malitiâ præcogitatâ*, robbery in or near the highway, ſtabbing one not having ſtruck firſt, nor having a weapon drawn, tho the offenſes themſelves were at common law, yet becauſe at common law within clergy, they ſhall not be ouſted of clergy, tho convicted, unleſs theſe circumſtances, as *ex malitiâ præcogitatâ*, or *prope altam viam*, &c. be expreſſed in the indictment.

But where an offenſe is made felony, or otherwiſe puniſhable by act of parliament, tho the indictment muſt take in the circumſtances, which in the body of the act make up the offenſe, yet if by a proviſo in the ſame ſtatute, or by any ſubſequent ſtatute ſome caſes [171] or circumſtances are exempted out of the act, the indictment need not mention and qualify the offenſe, ſo as to exempt it out of the proviſo, but the party ſhall have advantage of the proviſo by pleading *not guilty*, and in the ſame manner ſhall have advantage of the ſubſequent ſtatute to excuſe him by virtue of the ſtatute of 21 *Jac. cap.* 4.

If a ſtatute prohibit any act to be done, and by a ſubſtantive clauſe gives a recovery by action of debt, bill, plaint, or information, but mentions not indictment, the party may be indicted upon the prohibitory clauſe, and thereupon fined, but not to recover the penalty, as upon the ſtatute of 3 *Jac. cap.* 5. prohibiting recuſants to baptize their children by a popiſh prieſt. *H.* 7 *Car. B. R. per Cur'*, but

(g) This is alſo alterd by 4 *Geo.* 2. *cap.* 26. 6 *Geo.* 2. *cap.* 6. which prohibits all abbreviations in indictments, &c.

then

then it ſeems the fine ought not to exceed the penalty, *P.* 22 *Car. B. R. College of Phyſicians, vide tamen M.* 20 *Jac. B. R. Croke, n.* 4. *Caſtle*'s caſe *contra. (h)*

But if the act be not prohibitory, but only that if any perſon ſhall do ſuch a thing, he ſhall forfeit 5*l.* to be recoverd by action of debt, bill, plaint, or information, he cannot be indicted for it, but the proceeding muſt be by action, bill, plaint, or information. *P.* 6 *Car. B. R. Day*'s caſe.

If a man be indicted for an offenſe, which was at common law, and concludes *contra formam ſtatuti*, but in truth it is not brought by the indictment within the ſtatute, it ſhall be quaſhed, and the party ſhall not be put to anſwer it as an offenſe at common law.

As if a man be indicted for drawing his dagger in the church upon *J. S. contra formam ſtatuti, viz.* 5 *E.* 6. *cap.* 4. but omits theſe words *with an intent to ſtrike*, the indictment ſhall be quaſhed, and the party not put to anſwer the aſſault at common law. *P.* 33 *Eliz. B.R. Croke, n.* 23. *Penhallo*'s caſe. *(i)*

So if a man be indicted for a riotous and forceable entry *contra formam ſtatuti, viz.* 8 *H.* 6. *cap.* 9. and the ſtatute is miſrecited, he ſhall not be put to anſwer the offenſe at common law, but the indictment ſhall be quaſhed. *M.* 35 & 36 *Eliz. B. R.* [172] *Croke, n.* 10. *Hall* and *Gaven (k), M.* 41 *Eliz. B.R. Croke, n.* 10. *Eden*'s caſe *(l)* yet *vide M.* 10. *Car. Holme*'s caſe. *(m)* A man indicted for felonious burning of a houſe, upon *not guilty* pleaded a ſpecial verdict was found, it was adjudged no felony, as the caſe was found, yet upon the ſame indictment he was adjudged to the pillory, and fined 500*l.* and bound to his good behaviour, but *quære* of that caſe, for it ſeems unreaſonable, becauſe being tried for felony, he hath not thoſe advantages for his defenſe, as if he were indicted only for treſpaſs; *(n) M.* 10 *Car. B.R. Croke, n.* 3. *vid.* 2 *H.* 7. 10. *b.*

If a ſtatute be particular, it muſt be recited in the indictment, and proved by an examined copy upon the trial.

But if a man be indicted *quòd furatus eſt*, and ſays not *felonicè*, this indictment imports but a treſpaſs, and the offender may be put to anſwer it as a treſpaſs. 2 *H.* 7. 10. *b.* 18 *E.* 4. 10. *b.*

(b) Cro. Eliz. 644.
(i) Cro. Eliz. 231.
(k) Cro. Eliz. 307.
(l) Cro. Eliz. 697.
(m) Cro. Car. 376.
(n) For inſtance, he could not have the aſſiſtance of counſel.

And

And ſo it ſeems, if a man be indicted at a leet, *quòd felonicè rapuit* ſuch a woman, and this indictment is removed into the king's bench; becauſe the leet hath no juriſdiction to take an indictment of rape as a felony, he ſhall not be put to anſwer it as a felony, but ſhall be fined as for a treſpaſs, becauſe as a treſpaſs the leet may enquire of it. 6 *H.* 7. 5. *a.*

If it be a general ſtatute, it need not be recited, but it is ſufficient to conclude *contra formam ſtatuti in hujuſmodi caſu edit' & provis'*, for the court ought to take notice of it, and all penal ſtatutes, that induce a forfeiture to the king, or make a felony or treaſon are general ſtatutes, becauſe it concerns the king; but if a general ſtatute be recited in an indictment, and be miſrecited in a point material, and conclude *contra formam ſtatuti prædicti*, it is fatal, and the indictment ſhall be quaſhed, but it ſeems, that if it conclude generally
[173] *contra formam ſtatuti in hujuſmodi caſu edit' & provis'*, it is good, for the court takes notice of the true ſtatute, and will reject the miſrecital as ſurpluſage. *M.* 7 *Car. B. R. Croke, n.* 14. *Barn*'s caſe *(o)* in maintenance, and *M.* 8 *Car. B. R. per Jones ſuper ſtat. de cottages (p)*.

1. If an act of parliament making a felony or other offenſe be but temporary, and made perpetual by another ſtatute, the indictment concluding *contra formam ſtatuti* is good.

2. If the former ſtatute be diſcontinued, and revived by another ſtatute, the beſt way is to conclude *contra formam ſtatutorum*, *M.* 31 & 32 *Eliz. B. R. Mill*'s caſe, tho there is good opinion, that it is good enough to conclude *contra formam* of the ſtatute, as in caſe of the ſtatute of 5 *E.* 6. of ingroſſing, 37 *H.* 8. for uſury, and 5 *Eliz.* for perjury, which were diſcontinued and revived, yet the indictments good concluding *contra formam* of the firſt ſtatute. *T.* 9 *Jac. Rot.* 124. *C. B. Weſtwood*'s caſe.

3. If one ſtatute be relative to another, as where the former makes the offenſe, the latter adds the penalty, as the ſtatutes of 1 and 23 *Eliz.* the indictment ought to conclude *contra formam ſtatutorum. P.* 42 *Eliz. B. R. Croke, n.* 6. *Dingly* and *Moore (q)*.

III. Touching the joining of perſons and offenſes in one indictment.

(o) Cro. Car. 232. *(p)* 31 *Eliz. cap.* 7. *(q) Cro. El.* 750.

larciny

If there be one offender and ſeveral capital offenſes committed by him, they may be all contained in one indictment, as burglary, and larciny: Larcinies committed of ſeveral things, tho at ſeveral times, and from ſeveral perſons, may be joined in one indictment.

If there be ſeveral offenders, that commit the ſame offenſe, tho in law they are ſeveral offenſes in relation to the ſeveral offenders, 21 *E.* 4. yet they may be joined in one indictment, as if ſeveral commit a robbery, or burglary, or murder.

And ſo it is, if the offenſes are of ſeveral degrees, but dependent one upon another, as the principal in the firſt degree, and the principal in the ſecond degree, *viz. preſent, aiding,* and *abetting* the principal, and acceſſary before or after.

[174] IV. Touching the joining of ſeveral offenſes of the ſame nature, but diſtinctly committed by ſeveral offenders, ſome have been ruled inſufficient, as an indictment of ſeveral perſons, *quòd non eſcourarunt foſſata ſeparalia ante ſeparalia ſua pomaria,* quaſhed in 23 *Car.* 1. *B. R.* ſo of ſeveral officers, *quòd colore ſeparalium officior' ſuorum ſeparaliter extorſivè ceperunt, &c. M.* 33 & 34 *Eliz. B. R. Lake*'s caſe in *Hughe*'s *Rep.* and ſo if two are indicted for uſing a trade not being bound apprentice, it is not good. *P.* 16 *Car.* 1. *B. R. Brooke*'s caſe *(r)*.

But yet in 21 *T.* 21 *Jac. B. R. A. B. C.* and *D.* were indicted for erecting four ſeveral inns *ad commune nocumentum,* it was ruled, that for ſeveral offenſes of the ſame nature ſeveral perſons may be indicted in the ſame indictment, but then it muſt be laid *ſeparaliter erexerunt,* and for want of that word *(ſeparaliter)* the indictment was quaſhed.

And it is common experience at this day, that twenty perſons may be indicted for keeping diſorderly houſes, or bandy-houſes, and they are daily convict upon ſuch indictments, for the word *ſeparaliter* makes them ſeveral indictments.

(r) 2 *R. A.* 78. *pl.* 6.

CHAP.

CHAP. XXV.

Concerning the forms of indictments *in particular, and the* ſeveral parts *thereof.*

THE moſt conſiderable parts of an indictment in capital offenſes are, 1. The name and addition of the party offending. 2. The day and time of the offenſe committed. 3. The place where it was committed. 4. Upon or againſt whom committed. 5. The manner of the commiſſion of it. 6. The fact itſelf and the nature of it. 7. The concluſion.

[175] This is the grammatical order, wherein things are ſet down in the indictment, and upon theſe parts moſt of the conſiderations and obſervations touching indictments do ariſe, and thoſe that are not reducible to theſe heads, are partly obſerved before, and ſhall be more fully proſecuted in the end of this chapter.

I. As to the name and addition of the party indicted, this regularly ought to be inſerted, and inſerted truly in every indictment.

But if the party be indicted by a wrong chriſtian name, ſirname, or addition, and he plead to that indictment *not guilty*, or anſwers to that indictment upon his arraignment by that name, he ſhall not be received after to plead *miſnomer*, or falſity of his addition, for he is concluded and eſtopped by his plea by that name, and of that eſtoppel the gaoler and ſheriff, that doth execution, ſhall have advantage.

M. 16 *Jac.* and *P.* 17 *Jac. B. R.* Debt was brought againſt Sir *Francis Forteſcue* knight and baronet, and he appeard, and judgment given againſt him, ruled 1. That he ſhall never aſſign for error, that he was no baronet, tho baronet be parcel of the name. 2. If execution be ſued againſt him by the name of Sir *Francis Forteſcue* knight and baronet, and he brings falſe impriſonment againſt the ſheriff, the ſheriff ſhall have advantage of this eſtoppel, adjudged *(a)*.

Therefore he, that will take advantage of the *miſnomer* of his chriſtian name, addition, or ſirname, muſt do it upon his arraignment, and the entry muſt be ſpecial, *viz. ſuper quo venit* Robertus

(a) 2 *Rol. Rep.* 50, 88.

Williams,

Williams, *qui indictatus eſt per nomen* Johannis Williams, *& dicit quòd ubi in indictamento ſupponitur, quòd quidam* Johannes Williams *vi & armis, &c. ipſius nomen eſt* Robertus *& non* Johannes; for, if he ſhould ſay *venit prædictus* Johannes Williams, he concludes himſelf, and cannot plead, that is name is *Robert*, and ſo I have known it ruled againſt the book of 1 *E.* 4. 2. *b.*

The miſnaming of the ſirname of the offender in an appeal is a good plea in abatement, but tho the ſirname be miſtaken in an indictment, yet it ſhall not abate. 1 *H.* 5. 5. *b. per Hankford. Stamf. P. C. Lib.* III. *cap.* 18. *tamen quære.* [176]

But the miſtake of the chriſtian name is pleadable, as well in caſe of an indictment, as an appeal, and the party ſhall be diſmiſſed from that indictment. 11 *H.* 4. 41. *b. Coron.* 88. *Stamf. P. C. ubi ſupra*, but by *Rolf* 3 *H.* 6. 26. *a.* it is no plea in an indictment *(b)*.

But the ſafeſt way is to allow his plea of *miſnomer* both as to his ſirname and as to his chriſtian name, for he that pleads *miſnomer* of either, muſt in the ſame plea ſet forth what his true name is, and then he concludes himſelf, and if the grand jury be not diſcharged, the indictment may preſently be amended by the grand jury, and returned according to the name he gives himſelf.

By the ſtatute of 1 *H.* 5. *cap.* 5. in all indictments, *&c.* the party indicted ought to have the addition of his myſtery, degree, place, and county.

Therefore, if the party indicted have no addition, or a falſe addition, he may upon his arraignment except to the former, and plead to the latter.

And if he be outlawed upon ſuch indictment, where there is no addition, or a falſe addition, he may avoid it by a writ of error, *&c.*

But altho there be no addition, yet if he appear, and plead not guilty without taking advantage of that defect, he ſhall never allege the want of addition to ſtop his trial or judgment, for by ſuch his appearance and pleading to iſſue the indictment is affirmed, and the want of addition ſalved, and the ſtatute ſatisfied. *H.* 18 *Jac. B. R. Croke, n.* 5. *Johnſon's* caſe *(c)*, adjudged.

The addition required by the ſtatute is of his degree, as *Yeoman, Gent, Eſq*; of his myſtery, as *huſbandman, ſailor, ſpinſter, &c.* therefore, if the addition be only general, as ſervant, farmer, citizen, 9 *E.* 4. 48.

(*b*) The words of the book are, *it is no plea in felony.* (*c*) *Cro. Eliz.* 609.

4. 48. *a.* or of crimes or misdemeanors only, as extortioner, vagabond, heretic, 22 *E.* 4. 1. *a.* these are no good additions.

[177] The addition ought to be to his substantive name, not only to the *alias dictus*. *M.* 33 & 34 *Eliz. Croke, n.* 11. *Leke's* case *(d)* as *A. B. alias dictus A. C. butcher*, because regularly the addition refers to the last antecedent, and upon the same reason it is, if the indictment run Sibilla B. *nuper de* C. *uxor* Johannis B. *nuper de* C. *spinster*, because *spinster* is an addition applicable to the husband, as well as to the wife; but an indictment of *John B. vir*, Emelin B. *nuper de* C. *yeoman* is good, because *yeoman* is not applicable to a woman, but to a man. *P.* 31 & 32 *H.* 8. *Dyer* 46, 47. adjudged, and 4 *H.* 6. 4. *b.*

Single woman is a good addition, 14 *E.* 4. 7. *b.* so is *widow*, 10 *H.* 6. 21. *a.* so is *uxor J. S.* adjudged, *P.* 42 *Eliz. B. R. Elianor Gower's* case.

An indictment against a peer of the realm is good without an addition, because no process of outlawry lies against him. *M.* 31 & 32 *Eliz. B. R. Croke, n.* 15. Lord *Dacre's* case *(e)*.

If several persons be indicted for one offense, *misnomer* or want of addition of one quasheth the indictment only against him, and the rest shall be put to answer, for they are in law as several indictments, and so in trespass. 7 *E.* 4. 10. *b.*

Because the titles of misnomer and addition are general titles, whereof much is said in our books, as well in cases of civil suits as indictments, this shall suffice in this place touching this part of the indictment.

II. Touching the time, *viz.* the year and day, wherein the fact was committed; this is necessary to be contain'd in the indictment.

Tho the day be inserted, but not the year, the indictment is insufficient, and it shall not be supplied by intendment of *(ultimato præterito,)* unless it be so express, but if it be so express, it is sufficient ascertaining the year by the day of the sessions. *Lamb.* 49.

If the sessions be held the 20 day of *May*, and the indictment sup-
[178] pose the offense to be the 10 day of *Maii ultimi præteriti*, it relates to the month, if *ultimo præteriti* it relates to the day by the necessary grammatical construction, but if it be *ult' præterit'* with an abbreviation without the termination of the genitive or ablative case, it shall relate to the day, *viz.* the 10th day of the same *May*, as if it were in *English* the 10th day of *May* last past, it re-

(d) *Cro. Eliz.* 249, 198. (e) *Cro. Eliz.* 143.

lates

lates to the day and not to the month regularly, and ſo for the words next enſuing, *vide P.* 23 *Eliz. B. R. Rot.* 39. *b.* Sir *Richard Shuttleworth's* caſe, *M.* 21 *Jac. B. R. Croke, n.* 14. *Buckley's* caſe *(f)*.

If *A.* be indicted, that he *in feſto Sancti Petri anno* 20 *Car.* kild *J. S.* this is not good, becauſe there be two feaſts of St. *Peter*, and neither without addition. 3 *H.* 7. 5. *b. viz.* St. *Peter ad vincula*, and St. *Peter in cathedrâ.*

If *A.* be indicted, *quòd primo die* Maii *& ſecundo die* Maii *apud* D. he made an aſſault upon *B. & quandam togam ipſius* B. *adtunc & ibidem invent' felonicé cepit, &c.* this indictment is not good, becauſe there are ſeveral days mentiond before, and it is uncertain to which the felonious taking ſhall relate. 2 *H.* 7. 7. *b. &* 10 *b.*

A. is indicted, *quòd primo die* Maii *anno* 21 Eliz. *in quendam* B. *inſultum fecit & ipſum verberavit*, and ſays not *adtunc & ibidem verberavit*, yet ruled good, for the *vi & armis*, day and place named in the beginning refer to all the enſuing acts. 5 *H.* 7. 17. *b.*

But in an indictment of felony there muſt be *adtunc & ibidem* to the ſtroke or to the robbery, and the day and place of the aſſault is not ſufficient*, and this is *in favorem vitæ. P.* 43 *Eliz. B. R. Richardſon's* caſe. And therefore it is uſual to repeat the *adtunc & ibidem* to the ſeveral parts of the fact, as in larciny or robbery from the perſon, *quód* A. B. *die, &c. anno, &c. apud, &c. in quendam* C. D. *inſultum fecit, & bona & catalla ipſius* C. D. *ſcilicet unam togam ad valen', &c. adtunc & ibidem inventam adtunc & ibidem felonicé cepit & aſportavit*; A. is indicted, *quòd primo die* Maii *anno* 2 Eliz. *apud* C. *habens in manu ſuâ dextrâ gladium, &c. percuſſit* B. and it is not ſaid *adtunc & ibidem percuſſit* quaſhed, becauſe the day and year, and place relate only to the having of [179] the ſword, not to the ſtroke. *H.* 42 *Eliz. Croke, n.* 11. *Cotton's* caſe *(g)*.

If *A.* be indicted of murder or manſlaughter, as well the day and place of the ſtroke or other act done inducing, death, as of the death, muſt be expreſt, the former, becauſe the eſcheat or forfeiture of lands relates thereto, the latter, becauſe it muſt appear, that the death was within the year and day after the ſtroke.

But tho the day or year be miſtaken in the indictment of felony or treaſon, yet if the offenſe were committed in the ſame county, tho

(*f*) *Cro. Jac.* 677.
* Becauſe it is the ſtroke or robbery, which makes the felony.
(*g*) *Cro. Eliz.* 739.

at another time, the offender ought to be found guilty; but then it may be requiſite, if any eſcheat or forfeiture of land be conceived in the caſe for the petit jury to find the true time of the offenſe committed, and therefore it is beſt in the indictments to ſet down the times as truly as can be, tho it be not of abſolute neceſſity to the defendant's conviction. 2 *Co. Inſtit.* 318. *P.* 32 *Eliz. Syer*'s caſe adjudged. *Co. P. C. p.* 230.

And therefore, if for that variance he be acquitted, he is erroneouſly acquitted, and yet that erroneous acquittal ſhall be a good plea of *auterfoits acquit*, for if he be afterwards indicted for the ſame felony, and the day truly ſet forth, he may aver it to be the ſame felony notwithſtanding the variance in the day. 2 *Co. Inſtit. ubi ſupra* in felony, and the ſame law is in treaſon. *Co. P. C. p.* 230.

Where the time of the day is material to aſcertain the nature of the offenſe, it muſt be expreſt in the indictment, as in an indictment for burglary it ought to ſay *tali die circa horam decimam in nocte ejuſdem dici felonicè & burglariter fregit*, yet by ſome opinion *burglariter* carries a ſufficient expreſſion, that it was done in the night.

So upon breaking a houſe in the day-time, to ouſt the offender of his clergy upon the ſtatute of 39 *Eliz. cap.* 15. it is uſual to add *tempore diurno*, for the ſtatute expreſſeth it ſo, otherwiſe, tho the indictment be good, yet he ſhall not be ouſted of his clergy.

[180] III. Touching the place where the felony is committed; regularly the vill, or hamlet and county muſt be expreſt in the indictment.

And herein much of what hath been ſaid of the time will be applicable to the place, for where the time muſt be repeated again upon ſeveral acts done, yet regularly the place alſo muſt be repeated, *viz. adtunc & ibidem.*

In ſome crimes no vill need be named, as upon an indictment of barretry, becauſe he is a barretor every-where, and it ſhall be tried *de corpore comitatûs*. *T.* 43 *Eliz. B. R. Tunſtall*'s caſe, but *P.* 3 *Car. B. R. Mann*'s caſe the indictment was quaſhed for want of a vill alledged; the latter reſolution is fitteſt to be purſued.

Suff. In the margin, the indictment ſuppoſing a fact done *apud* S. *in com' prædict'* is good, for it refers to the county in the margin.

But if there be two counties named, one in the margin, another in the addition of any party, or in the recital of an act of parliament recited in the premiſes of the indictment, the fact laid *apud* S. *in com' prædicto*

prædicto vitiates the indictment, becauſe two counties are named before, and it is uncertain to which it refers. *H.* 42 *Eliz. B. R. Croke*, *n*, 12. *Wingfield*'s caſe *(h)*.

Indictment againſt *A. B.* that he *apud* N. *in com' prædict'* made an aſſault upon *C. D.* of *F. in com' prædict'*, *& ipſum adtunc & ibidem cum quodam gladio, &c. percuſſit, &c.* this indictment is not good, becauſe two places named before, and if it refers to both, it is impoſſible, and if only to one, it muſt refer to the laſt, and then it is inſenſible. 2 *H.* 7. 10. *b. P.* 44 *Eliz. B. R. Ogle*'s caſe.

A. is indicted, *quòd ipſe tali die & anno apud* C. *in quendam* B. *inſultum fecit, & ipſum cum quodam cultello, &c. felonicè percuſſit, occidit, & murdravit* without ſaying *adtunc & ibidem percuſſit, occidit, & murdravit*, the indictment is not good, for the aſſault may be at one day and place, and the killing at another. *P.* 5 *E.* 6. *Dy.* 68, 69. 1 *R.* 3. 1. *a.*

If a man be indicted for that *ratione tenuræ* of certain lands he is bound to repair a bridge, and that it is in decay, it muſt be alleged where thoſe lands lie. 5 *H.* 7. 3. *b.* [181]

IV. Touching the name of the perſon upon whom the offenſe is committed.

An indictment of murder *cujuſdam ignoti* is good, and ſo for ſtealing of the goods *cujuſdam ignoti*, *Plo. Com.* 85. *b. Partridge*'s caſe, 1 *Mar. Dy.* 99. *a.* ſo of an aſſault *in quendam ignotum*, and if he be acquitted or convicted, and be afterwards indicted for an aſſault or murder of ſuch a man by name, he may plead the former conviction or acquittal, and aver it to be the ſame perſon. 11 *Eliz. Dy.* 285. *a.*

But an indictment, *quod invenit quendam hominem mortuum, ac felonicè furatus eſt duas tunicas*, without ſaying *de bonis & catallis cujuſdam ignoti*, is not good. 11 *R.* 2. *Enditement* 27.

If the goods of a chapel be ſtolen, the indictment ſhall ſay *bona & catalla capellæ in cuſtodiâ præpoſitorum*, if it be done in time of vacation *bona & catalla capellæ tempore vacationis*; but if the goods of a pariſh church be ſtolen, as the bell, the books, *&c.* it ſhall run *bona parochianorum de* S. *in cuſtodiâ gardianorem eccleſiæ*, and ſhall not ſuppoſe them *bona eccleſiæ*. 7. *E.* 4. 14, 15. *M.* 31 & 32 *Eliz. B. R. Hadnam* & *Green* verſus *Ringwood (i)*. *T.* 36 *Eliz. B. R. Methold* & *Barefoot.*

(h) *Cro. Eliz.* 739. *(i)* *Cro. Eliz.* 145, 179.

If the goods, which *A.* hath as executor of *B.* be ſtolen, the offender may be indicted, *quòd bona* B. *teſtatoris in cuſtodiâ* A. *executoris ejuſdem* B. *&c. Lamb.* 496. or it may be general *bona ipſius* A.

If *A.* dying, be buried, and *B.* opens the grave in the night time and ſteals the winding-ſheet, the indictment cannot ſuppoſe them the goods of the dead man, but of the executors, adminiſtrators, or ordinary, as the caſe falls out. *Co. P. C.* 110 *(k)*.

If *A.* delivers goods to *B.* a common carrier to carry for him, and *B.* is robbed, the indictment may ſuppoſe them the goods of *A.* or the goods of *B.* at election, for *B.* hath a kind of ſpecial property, becauſe chargeable for them to *A.*

[182] An indictment, *quòd felonicè, &c. cepit quandam peciam panni cujuſdam* J. S. without ſaying *de bonis & catallis cujuſdam* J. S. was therefore quaſhed. *M.* 38 & 39 *Eliz. B. R. Croke, n.* 6. *Long*'s caſe *(l)*.

There is no need of an addition of the perſon robbed or murdered, *&c.* unleſs there be a plurality of perſons of the ſame name, neither then is it eſſential to the indictment, tho ſometimes it may be convenient for diſtinction ſake to add it, for it is ſufficient, if the indictment be true, *viz.* that *J. S.* was killed or robbed, tho there are many of the ſame name.

V. Touching the thing wherein or of which the offenſe is committed, there is required a certainty in an indictment.

An indictment againſt *A.* that he is *communis latro*, 29 Aſſ. 45. *communis champartor, conſpirator, confœderator*, 29 Aſſ. 45. *defamator bonorum nominis & famæ*, M. 14 Jac. B. R. Jones's *caſe (m)*, *communis malefactor*, 22 Aſſ. 73. *common robber*, 3 *E.* 2. *action ſur ſtatute* 26. *communis malegeſtûs, & communis perturbator pacis domini regis*, M. 6 Car. 1. B. R. *Periam*'s caſe *(n)*, are not good, becauſe they are too general and contain not the particular matter, wherein the offenſe was committed.

But *communis barrectator & pacis domini regis perturbator & litium ſeminator* is good, becauſe barretry is an offenſe known in law, and conſiſts of divers particulars, and the reſt that is added thereunto are but the aggravations of the offenſe, for barretry itſelf is the crime, *M.*

(k) Haine's caſe, 12 *Co.* 112.
(l) Cro. Eliz. 490.
(m) 2 *R. A.* 79. *pl.* 1.
(n) Ibid. 79. *pl.* 10.

15 *Jac. B. R. Bowſer*'s caſe *(q)*; ſo an indictment, that he is *noctivagus* is good. *H.* 2 *Car.* 1. *B. R.*

An indictment againſt *A. quòd felonicé cepit & aſportavit bona & catalla* B. without ſhewing what in certain, as *ſcilicet unum equum, unum bovem, &c.* is not good. *Lamb.* 496.

The number of things ſtolen muſt be expreſt, therefore it is not ſufficient to ſay *felonicè furatus eſt aves* or *columbas* out of a dove-cote, or young hawks out of the neſt without expreſſing their number.

If theft be alledged of any thing, the indictment muſt ſet down the value, that it may appear, whether it be grand or petit larceny. *Lamb.* 497. [183]

Where theft is charged in an indictment for a living thing, as a horſe or ſheep, the regular way is to ſay *pretii* 5*s. &c.* if it be of a dead thing, that is eſtimated in the indictment by weight or meaſure, there alſo it ought to be *pretii*, and ſo it may be, if it be of any ſingle thing, tho dead, and not eſtimated by weight or meaſure.

But if it be dead things in the plural number, there it ought to be *ad valenciam. Lamb.* 497. but this I take to be but clerkſhip and not ſubſtantial, for if *pretii* be ſet inſtead of *ad valenciam*, or *e converſo*, I think it doth not vitiate the indictment, and ſo it is, if one *pretii* or *ad valenciam* be added to ſeveral things, where in true clerkſhip it ſhould be applied ſeverally, it is good if the party be convict of all, but poſſibly, if the party be convict but of part, it is not good, becauſe it will be uncertain, whether grand or petit larceny. *Noy*'s *Rep.* 115. *Wood* and *Smith*, yet *vide T.* 23 *Car.* 1. *& M.* 23 *Car.* 1. *B. R. Brook*'s caſe, *and William Arundell*'s caſe in [action of] treſpaſs, where there is but one *ad valenciam*, where divers goods were taken, tho it be aided after a verdict, yet, if the judgment be by *nihil dicit*, it was ruled error, and indictments are not aided by verdict.

An indictment, *quòd felonicè cepit* 20 *oves matrices & agnos* or *matrices & verveces*, is not good, becauſe it doth not appear how many of one ſort and how many of another, but 20 *oves* generally might have been good without diſtinguiſhing *matrices & verveces*, as in caſe of replevin or treſpaſs.

But an indictment *de quatuor riſeis & ciſtis, Anglicé* cheſts and coffers, is good, becauſe *ſynonyma*, *P.* 40 *Eliz. Drecot & Henſhaw*; regularly the ſame certainty is required in an indictment for goods, as in treſpaſs for goods, and rather more certainty, for what will be a defect

(q) Ibid. 79. *pl.* 3.

of certainty in a count will be much more defective in an indictment, therefore for this matter *vide* title *Count & Breve per totum.*

VI. The fact itſelf muſt be certainly ſet down in an indictment.

[184] An indictment againſt *A. quòd felonice abduxit unum equum* without ſaying *cepit & abduxit* is not good, for he might have the horſe by bailment, and then it is no felony. 13 *E.* 4. 10. *a.*

An indictment of poiſoning, wherein it is alledged, that J. S. *fidem adhibens* to the priſoner, *& neſciens potum prædictum cum veneno fore intoxicatum accepit & bibit*, and ſays not *venenum prædictum*, is not good, and ſhall not be ſupplied by the implication of other parts of the indictment. 4 *Co. Rep.* 44. *b. Vaux*'s caſe.

An indictment of rape, *quòd felonice & carnaliter cognovit* without the word *rapuit* is not good, tho it concludes *contra formam ſtatuti.* 9 *E.* 4. 26. *a.*

An indictment, that A. *exoneravit quoddàm tormentum, &c. verſus* B. *dans ei unam mortalem plagam* without ſaying *percuſſit*, is not good. 5 *Co. Rep. Long*'s caſe 122. *a.*

So if it be *dedit mortalem plagam* without *percuſſit*, it is not good. *P.* 9 *Jac. B. R. Bulſtrode*'s *Rep. p.* 124.

For burglary, the offenſe muſt be *fregit & intravit.*

VII. The offenſe itſelf muſt be alledged, and the manner of it *(p)*.

An indictment of felony muſt always allege the fact to be done *felonice*; an indictment of burglary muſt lay the offenſe to be *felonice & burglariter fregit & intravit*; an offenſe of high treaſon muſt be laid to be done *proditorie*; petit treaſon *felonice & proditorie*, for tho he be acquitted of the petit treaſon, he may be convict of the manſlaughter or murder.

A. is indicted, that *furatus eſt unum equum*, it is but a treſpaſs for want of the word *felonice. Stamf. P. C. p.* 96. *a.*

If *A.* be indicted, *quòd* 1 Decemb. *anno, &c. apud, &c. felonice & ex malitiâ ſuâ præcogitatâ in & ſuper* B. *inſultum fecit; & cum quodam gladio, &c. adtunc & ibidem percuſſit, & dedit eidem* B. *mortalem plagam, &c.* whereof he died, the firſt *felonice & ex malitiâ ſuâ præcogi-*

[185] *tatâ* applied to the aſſault runs alſo to the ſtroke; 1. becauſe placed in the beginning of the ſentence; 2. becauſe done *adtunc & ibidem.*

(*p*) This ſhould have been the 5th head according to our author's diviſion at the beginning of this chapter, but our author has here tranſpoſed it, and added a new fifth head *touching the thing wherein the offenſe is committed*, which makes the number of general heads in this chapter eight inſtead of ſeven.

An

An indictment of murder or manſlaughter hath theſe certainties and requiſites to be added to it more than other indictments, for it muſt not be only *felonice*, and aſcertain the time of the act done, but muſt alſo,

1. Declare how, and with what it was done, namely *cum quodam gladio, &c.*

Yet if the party were killed with another weapon, it maintains the indictment; but if it were with another kind of death, as *poiſoning*, or *ſtrangling*, it doth not maintain the indictment upon evidence. 2 *Co. Inſt.* 319. *Co. P. C. p.* 48.

And if *A.* and *B.* are indicted for murder, and it is laid, that *A.* gave the ſtroke, and *B.* was preſent, aiding and abetting, yet if it falls out upon evidence, that *B.* gave the ſtroke, and *A.* was preſent, aiding and abetting, it maintains the indictment. 9 *Co. Rep. Sanchar's* caſe *(q)*.

So if *A.* be indicted for poiſoning of *B.* it muſt allege the kind of poiſon, but if he poiſoned *B.* with another kind of poiſoning, yet it maintains the indictment, for the kind of death is the ſame.

2. He muſt ſhew in what hand he held his ſword.

If an indictment runs thus, that *cum quodam gladio, quem in dextrâ ſuâ tenuit, percuſſit*, without ſaying *in dextrâ manu*, for this cauſe an indictment was quaſhed. *P.* 44 *Eliz. B. R. Cuppledick's* caſe.

3. Regularly it ought to ſet down the price of the ſword or other weapon, or elſe ſay *nullius valoris*, for the weapon is a deodand forfeited to the king, and the townſhip ſhall be charged for the value if delivered to them.

But this ſeems not to be eſſential to the indictment.

4. It ought to ſhew in what part of the body he was wounded, and therefore if it be *ſuper brachium*, or *manam*, or *latus* without ſaying whether right or left, it is not good. 5 *Co. Rep.* 121. *b. Long's* caſe.

So if it be *in ſiniſtro bracio*, where it ſhould be *brachio*, it is not good, becauſe inſenſible. *T.* 31 *Eliz. B. R. Webſter's* caſe. [186]

So if the wound be laid *circiter pectus*, it is not good. *T.* 29 *Eliz. Clenche's Rep.* 10. *Super partes poſteriores corporis* not good. *H.* 23 *Car.* 1. *B. R. Savage's* caſe *(r)*.

But *ſuper faciem*, or *caput*, or *ſuper dextram partem corporis*, or *in infimâ parte ventris* are certain enough. *Long's* caſe, 5 *Co. Rep.* 121. *b.*

(q) 9 *Co.* 119. *a.* all that this caſe proves is only, that if a man be indicted as acceſſary to two, and he be found guilty as acceſſary to one, the verdict is good.

(r) *Styl.* 76.

5. Regularly

5. Regularly the length and depth of the wound is to be ſhewed, but this is not neceſſary in all caſes, as namely where a limb is cut off, 4 *Co. Rep.* 42. *a. Haydon's* caſe; ſo it may be alſo a dry blow, and *plaga* is applicable to a bruiſe or a wound.

But tho the manner and place of the hurt and its nature be requiſite, as to the formality of the indictment, and it is fit to be done, as near the truth as may be, yet if upon evidence it appear to be another kind of wound in another place, if the party died of it is ſufficient to maintain the indictment.

6. It is uſual to alledge the party ſtricken to have been *in pace Dei & domini regis*, but not neceſſary to be inſerted. 4 *Co. Rep.* 41. *b. Haydon's* caſe.

7. It is neceſſary to alledge in fact, that the party wounded died of that wound, and alſo the time and place, as well of the death as of the wound given, that it may appear, that he died within the year and day of that wound, as *de quâ quidem plagâ idem* J. S. *adtunc & ibidem inſtantèr obiit*, or *de quâ quidem plagâ mortali idem* J. S. *languebat, & languidus vixit uſque talem diem anno ſupradicto, quo quidem die idem* J. S. *de plagâ mortali prædictâ obiit.*

Altho as well in the indictment of manſlaughter as murder the ſtroke is to be alleged to be *mortalis plaga*, and given *felonice*, and in both caſes *interfecit*, yet in caſe of murder there is ſomewhat more to be laid, or otherwiſe it will amount but to an indictment of manſlaughter, and the offender ſhall have his clergy.

[187] And the ſpecial words in an indictment of murder are, 1. *Ex malitiâ præcogitatâ.* 2. *Murdravit*, this word *murdravit* is a word of art, and cannot be otherwiſe expreſt, therefore *murderavit* inſtead of *murdravit* vitiates an indictment of murder. *H.* 45 *Eliz. Croke, n.* 15. *Ryle's* caſe *(s)*.

Tho *murdravit* be in the indictment, yet if it want the words *ex malitiâ ſuâ præcogitatâ*, the party ſhall have his clergy. *Dy.* 224. *b.* 11 *Co. Rep.* 37. *a.*

An indictment of treaſon for counterfeiting the king's coin ought to ſhew particularly what kind of coin, *viz. groats*, or *ſhillings*. 27 *H.* 6. *Enditement* 10. but altho it is uſual to expreſs the numbers of each kind, yet it is not of abſolute neceſſity in the indictment. *M.* 38 & 39 *Eliz. B. R. Long's* caſe.

(*s*) *Cro. Eliz.* 920.

An

An indictment of high treaſon for conſpiring the king's death ought not only to contain the compaſſing or conſpiring to do the act, but muſt alſo ſet down an overt act in purſuance of it.

As in all indictments of felony there muſt be *felonice*, and of treaſon there muſt be *proditorie*, ſo it muſt be laid to be done *vi & armis* at common law. *Stamf. P. C.* 94. *a.*

But the ſtatute of 37 *H.* 8. *cap.* 8. hath now made that not to be neceſſary.

And therefore *P.* 16 *Jac. B. R. Croke, n.* 2. *Hart*'s caſe *(t)*, it was adjudged and affirmed in a writ of error, that an indictment of reſcue without the words *vi & armis* is good by reaſon of this ſtatute, which extends to make good indictments of felony, treaſon, or other miſdemeanors, notwithſtanding the omiſſion of *vi & armis*, as well as notwithſtanding the omiſſion of *gladiis, baculis & cultellis*, but this ſtatute extends not to declarations in treſpaſſes, ſuits between party and party, or informations for the king, but only to indictments.

VIII. Touching the concluſion of the indictment.

Upon an indictment of murder, where the ſtroke is ſuppoſed to be done at one day or place, and the death at another day or place, the concluſion ought not to be *& ſic felonice, voluntarie, & ex malitiâ ſuâ præcogitatâ prædictus* J. S. *præfatum* A. B. at the [188] day and place, where the ſtroke was given, *interfecit & murdravit*, this is not good, becauſe tho the ſtroke is the offenſe and cauſe of the death, yet it is neither murder nor manſlaughter till the party die. *M.* 32 & 33 *Eliz. B. R. Croke, n.* 13, *Foſter*'s caſe *(u)*.

But if it ſuppoſes the murder or manſlaughter to be where the party died, this is good, for then and not before it is murder. 4 *Co. Rep.* 41. *b. Haydon*'s caſe.

But the beſt way is *& ſic præfatus* A. *ipſum* B. *&c. modo & formâ prædictis interfecit & murdravit.* 4 *Co. Rep.* 42. *b. Haydon*'s caſe.

But if the concluſion be *& ſic præfatum* B. *apud* C. (where the ſtroke only was given) *modo & formâ prædict' interfecit & murdravit*, it is not good, for it is repugnant. *M.* 32 & 33 *Eliz. B. R. Croke, n.* 13, *Foſter* and *Hume.*

And if in the ſame caſe the concluſion be only *& ſic die & loco prædictis interfecit & murdravit*, it is doubtful whether it be good, becauſe one time and place is alleged for the ſtroke, another for the

(*t*) *Cro. Jac.* 473. vide *Cro. Jac.* 345. name of *Hume* and *Ogle.*
(*u*) *Cro. El.* 156. 4 *Co.* 42. *b.* by the

death,

death, and *(predictis)* may refer to either, *H.* 42 *Eliz. B. R. Croke, n.* 12. *Wingfield*'s caſe *(x)*.

Regularly every indictment ought to conclude *contra pacem domini regis*, for that is not taken away by the ſtatute of 37 *H.* 8. *cap.* 8.

And therefore an indictment without concluding *contra pacem, &c.* is inſufficient, tho it be but for uſing a trade not being an apprentice. *H.* 23 *Car.* 1. *B. R.* for every offenſe againſt a ſtatute is *contra pacem*, and ought ſo to be laid.

But an indictment need not conclude, *& contra coronam & dignitatem ejus*, tho it be uſual in many indictments. *M.* 23 *Car. B. R.*

An indictment that concludes *contra pacem*, and ſaith not *domini regis*, is inſufficient. *M.* 23 *Car.* 1. adjudged.

If *A.* be indicted for an offenſe ſuppoſed to be committed in the time of a former king, and concludes *contra pacem domini regis nunc*, it is inſufficient, for it muſt be ſuppoſed to be done *contra pacem* of that king, in whoſe time it was committed.

[189]

But if a man be indicted in the time of one king *contra pacem domini regis nunc*, he may be arraigned for that offenſe in the time of his ſucceſſor. 1 *E.* 6. *B. Corone* 178. *Enditement* 44. neither is the indictment itſelf diſcontinued by the demiſe of the king, tho in ſome caſes the proceſs be. 7 *Co. Rep.* 30, 31.

If an offenſe be ſuppoſed to be begun in the time of one king, and continued in the time of his ſucceſſor, (as a nuiſance,) it muſt conclude *contra pacem* of both kings, or elſe it is inſufficient. *T.* 3 *Jac. B. R. Yelverton's Rep.* 66. Sir *John Winter*'s caſe.

If an offenſe be alledged in the time of Q. *Eliz.* and the indictment taken in the time of K. *James*, and concludes *contra pacem nuper reginæ & domini regis nunc*, it ſeems good, and *domini regis nunc* but ſurpluſage, as well as in a count in treſpaſs. *M.* 13 *Jac. Croke, n.* 3. *Cottington* and *Wilkins*, *(z) quære.*

Touching the concluſion *contra formam ſtatuti*, ſomewhat hath been ſaid in the laſt chapter; I ſhall add ſome things more.

If an offenſe be newly enacted, or made an offenſe of an higher nature by act of parliament, the indictment muſt conclude *contra formam ſtatuti*, as an indictment for buggery, tranſporting of wool, *&c.*

Rape, tho before the ſtatute of *Weſtminſter* 2. it was a treſpaſs, yet being made felony by that ſtatute, the indictment ought to conclude *contra formam ſtatuti*, 6 *H.* 7. 5. *a.*

(x) *Cro. Eliz.* 739. (z) *Cro. Jac.* 377.

If

If an offenſe were high treaſon, &c. at the common law, and a declarative act of parliament declares it ſo, as the ſtatute of 25 *E.* 3. *de Proditinibus*, the ſtatute of 3 *H.* 5. of clipping the coin, &c. till repealed by 1 *Mar.* the indictment is good with a concluſion *contra formam ſtatuti*, or without ſuch a concluſion.

But at this day the indictment for clipping, waſhing, &c. of coin enacted to be treaſon by the ſtatutes of 5 & 18 *Eliz.* muſt not only expreſs, as the ſtatute requires, that it was *(cauſa lucri,)* [190] but muſt conclude *contra formam ſtatuti.*

If an offenſe were felony at common law, but a ſpecial act of parliament ouſt the offender of ſome benefit, (that the common law allowed him,) when certain circumſtances are in the fact, tho the body of ſuch indictment muſt expreſs thoſe circumſtances according as they are preſcribed in the ſtatute, yet the indictment muſt not conclude, *contra formam ſtatuti.*

Thus the ſtatute of 21 *Jac. cap.* 27 concerning murdering of baſtard children requires proof by one witneſs, that the child was dead born, the indictment muſt ſhew, that it was a baſtard child, to bring the offender within that ſtatute, but concludes not *contra formam ſtatuti.*

So by the ſtatute of 8 *Eliz. cap.* 4. in caſes of pick-pockets, 39 *Eliz. cap.* 15. breaking houſes in the day-time, and ſtealing to the value of 5*s.* the ſtatute of 23 *H.* 8. *cap.* 1. in caſes of petit treaſon, wilful murder of malice prepenſe, robbing in or near the highway, 18 *Eliz. cap.* 7. in caſe of burglary, the ſtatute of 4 & 5 *P.* & *M. cap* 4. in caſe of malicious commanding, &c. any perſon to commit murder, robbery, wilful burning, the offenders are ouſted of their clergy; the body of the indictment muſt bring them within the expreſs purview of the ſtatutes or otherwiſe they ſhall have the benefit of clergy, but it need not conclude *contra formam ſtatuti*, neither is it uſual in ſuch caſes, for they were felonies before, and the ſtatutes do not give them a new puniſhment, nor make them to be crimes of another nature, but only in certain caſes take away clergy.

But yet, if they ſhould conclude in theſe caſes *contra formam ſtatuti*, it would not vitiate the indictment, but would be only ſurpluſage; for tho the ſtatutes do not give a new penalty, yet they take away an old privilege, when the caſe falls within the circumſtances mentiond by the act.

Upon the ſtatute of 1 *Jac. cap.* 8. ouſting perſons of clergy in caſe of ſtabbing, the other party not having a weapon drawn, nor ſtricken

firſt

firſt, I have known it held it is ſufficient, that the indictment bring the fact within the purview of the ſtatute, tho it concludes not *contra formam ſtatuti*, becauſe it was felony before, and the ſtatute only takes away clergy. *H.* 23 *Car.* 1. *Page* and *Harwood (a)*.

Yet the uſual courſe at this day is to conclude ſuch an indictment *contra formam ſtatuti*, and accordingly it hath been ruled good. *T.* 9 *Jac. B. R. Croke, n.* 4. *Bradley* and *Banks*, but it is not there queſtioned but that it may be good without it; ſo that in theſe caſes, where clergy is ſpecially ouſted by an act of parliament, the indictment is good with this concluſion or without it, but the beſt way in theſe caſes is to follow what is moſt uſual.

If an offenſe be at common law, and alſo prohibited by ſtatutes, the indictment may conclude *contra formam ſtatuti* or *ſtatutorum*; thus in barretry, tho there be no direct ſtatute againſt it by that name, yet the general tenor of the ſeveral acts running againſt it by circumlocutions, the indictment concluding *contra formam ſtatuti*, or *diverſorum ſtatutorum* is good, and it is the uſual form. *M.* 31 & 32 *Eliz. B. R. Croke, n.* 14. *Burton*'s caſe *(b)*, *H.* 9 *Car.* 1. *B. R. Chapman*'s caſe *(c)*, but it muſt conclude alſo *contra pacem*, *Mi* 6 *Car. B. R. Periam*'s caſe *(d)*.

If an offenſe be at common law, and alſo prohibited by ſtatute, with a corporal or other penalty, yet it ſeems the party may be indicted at common law, and then, tho it conclude not *contra ſtatuti*, it ſtands as an indictment at common law, and can receive only the penalty, that the common law inflicts in that caſe.

Thus an indictment for a riot is good, tho it concludes not *contra formam ſtatuti*, becauſe an offenſe at common law, tho prohibited alſo by acts of parliament under ſeverer penalties. *P.* 5 *Jac. B. R. Wormall*'s caſe *(e)*.

So it ſeems, if perjury be committed, that is within the ſtatute of 5 *Eliz. cap.* 9. but concludes not *contra formam ſtatuti*, yet it is a good indictment at common law, but not to bring him within the corporal puniſhment of the ſtatute.

[192]

And yet *Mich.* 10 *Jac. B. R.* an indictment of forceable entry upon the ſtatute of 8 *H.* 6. *cap.* 9. and *Mich.* 9 *Car.* 1. *B. R.* an indictment for forgery quaſhed for not concluding *contra formam ſta-*

(a) *Aleyn* 43. *Styl* 85.
(b) *Cro. Eliz.* 148.
(c) *Cro. Car.* 340.
(d) 2 *R. A.* 82. *pl.* 5.
(e) 2 *R. A. p.* 82. *pl.* 4.

tuti,

tuli, *Smith*'s caſe *(f)*; yet both theſe were offenſes at common law tho reſtitution were not at common law in the firſt caſe nor pillory and loſs of ears in the ſecond, but only fine and impriſonment, or at moſt ſtanding in the pillory, but without mutilation.

Regularly, if a ſtatute only make an offenſe, or alter an offenſe from one crime to another, as making a bare miſdemeanor to become a felony, the indictment for ſuch new made offenſe, or new made felony muſt conclude *contra formam ſtatuti*, or otherwiſe it is inſufficient.

And on the other ſide, if an offenſe be purely at common law, if it conclude *contra formam ſtatuti*, it is inſufficient, and ſhall be quaſhed, except in the inſtance above given touching clergy, *de quo ſupra*.

And therefore an indictment of battery concluding *contra formam ſtatuti* is inſufficient, and ſhall be quaſhed. *T.* 12 *Car. B. R. Croke*, *n.* 2. *Cholmley*'s caſe *(g)*.

Theſe general obſervations I ſhall add touching indictments upon ſtatutes, and concluding *contra formam ſtatuti*.

Altho an indictment grounded upon a ſtatute muſt conclude *contra formam ſtatuti*, yet it is not neceſſary to recite the ſtatute in the indictment, unleſs it be a private ſtatute, whereof the court cannot take notice. *Plo. Com.* 79. *b. Patridge*'s caſe. *Dy.* 347. *a.* 363. *a.*

Altho it need not recite a general penal ſtatute, yet it muſt bring the fact within the expreſs prohibition of the ſtatute, otherwiſe the concluſion *contra formam ſtatuti*, and the implication thereof will not aid the indictment, but it will be inſufficient, 9 *E.* 4. 26. *b.* As in an indictment in a *premunire* for aiding one being a principal maintainer of the juriſdiction of the ſee of *Rome contra formam ſtatuti*, yet theſe words being omitted *to the intent to ſet forth the authority*, &c. which are part of the qualification of the offenſe containd in the ſtatute, the indictment is inſufficient, and not aided [193] by the concluſion *contra formam ſtatuti*. *T.* 20 *Eliz. Dy.* 363. *a. ibid.* 347. *a.* ſo an indictment upon the ſtatute of 1 *Jac. cap.* 12. of witchcraft, if A be indicted, that *exercuit incantationem*, *Anglicè* witchcraft, *contra formam ſtatuti*, without ſaying, that thereby any perſon was pined, lamed, &c. in his body, it is inſufficient, becauſe that is a circumſtance required to make it felony; but if the indictment be, that *exercuit*, *anglicè* did employ *malos & nefarios ſpiritus eâ*

(*f*) 2 *R. A.* 82. *pl.* 3. (*g*) *Cro. Car.* 465.

intentione

intentione to deſtroy *J. S.* this is good, tho no other event enſues, for the bare employment of evil ſpirits to or for any intent in felony. *T.* 24 *Car.* 1. *B. R.* upon an indictment removed from *St. Edmunds-Bury.*

And thus far touching the forms of indictments, wherein generally we are to take notice, 1. That none of the ſtatutes of jeofails extend to indictments, and therefore a defective indictment is not aided by verdict.

2. That in favour of life great ſtrictneſſes have been in all times required in points of indictments, and the truth is, that it is grown to be a blemiſh and inconvenience in the law, and the adminiſtration thereof; more offenders eſcape by the over eaſy ear given to exceptions in indictments, than by their own innocence, and many times groſs murders, burglaries, robberies, and other heinous and crying offenſes, eſcape by theſe unſeemly niceties to the reproach of the law, to the ſhame of the government, and to the encouragement of villany, and to the diſhonour of God. And it were very fit, that by ſome law this over-grown curioſity and nicety were reformed, which is now become the diſeaſe of the law, and will I fear in time grow mortal without ſome timely remedy *(h)*.

(*h*) This advice of our author would, if complied with, be of excellent uſe, for it would not only prevent the guilty from eſcaping, but would likewiſe be a guard to innocence, for thereby would be removed the only pretenſe, upon which counſel is denied the priſoner in caſes of felony; for if no exceptions were to be allowed, but what went to the merits, there would then be no reaſon to deny that aſſiſtance in caſes, where life is concerned, which yet is allowed in every petit treſpaſs.

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[194] CHAP. XXVI.

Concerning proceſs upon indictments.

IN many caſes upon an indictment proceſs of outlawry lies not at common law, nor at this day, as in an indictment of foreſtalling, 22 *E.* 4. 11. *b.* but in an indictment of treſpaſs the proceſs is *venire facias*, and when *non inventus*, is returned *capias* and *exigent*.

But in all indictments of felony or treaſon proceſs by *capias* and *exigent* lies, and at the common law in caſe of felony or treaſon there was

was but one *capias*, and upon *non inventus* returned an *exigent* awarded, and ſo to the outlawry. 22 *Aſſ.* 81. 1 *H.* 5. 6. *a.*

But by the ſtatute of 25 *E.* 3. *cap.* 14. If a man be indicted before juſtices in their ſeſſions to hear and determine, and be returned *non eſt inventus* upon the *capias* iſſued, another writ of *capias* ſhall iſſue returnable three weeks after with a precept to ſeiſe his goods, and detain them till the precept returned, and if again *non inventus* be returned, then an exigent ſhall iſſue, and the goods forfeit, and if he yield himſelf upon the *capias*, then the goods ſaved.

This ſtatute extends not to treaſon, and therefore certainly in treaſon the exigent muſt iſſue upon *non inventus* returned upon the firſt *capias*.

And altho the ſtatute ſpeaks generally of felony, it ſeems that upon an indictment of murder the *exigent* ſhall iſſue after the firſt *capias*, as at common law, and accordingly in an appeal of robbery. 8 *H.* 5. 6. *b.* *Proceſs* 226. *Coron.* 184.

But it is ſaid, that in an indictment (or appeal) of robbery there ſhall be two *capias* in the king's bench before the exigent ſhall iſſue. 8 *H.* 5. *ubi ſupra.* *Stamf. P. C. Lib.* II. *cap.* 17. *fol.* 67. *a.*

But at this day the proceſs in caſe of an indictment of any felony is only one *capias*, and then an *exigent*. [195]

For this ſtatute of 25 *E.* 3. *cap.* 14. as to the ſecond caſe is hardly applicable to the king's bench, nor indeed well to other juſtices, that ſit by commiſſion, for the ſecond *capias* is to be returned at three weeks after, which may be out of term, or after the ſeſſion of the juſtices ended; therefore *quære* the uſage.

By the ſtatute of 8 *H.* 6. *cap.* 10. upon appeals or indictments of treaſon, felony, or treſpaſs before juſtices of peace or any other having power to take ſuch indictments or appeals, or other juſtices or commiſſioners in any county or franchiſe againſt any perſon dwelling in any other county than where the indictment or appeal is taken, after the firſt *capias*, another *capias* ſhall iſſue to the ſheriff of that county, wherein the party indicted is ſuppoſed to be converſant, returnable before the ſaid juſtices or commiſſioners three months after, &c. with a precept to the ſheriff to make proclamation at two county courts for his appearance at the day of the return, and then the *exigent* to iſſue upon his default, and in caſe any *exigent* be awarded, or outlawry pronounced, otherwiſe to be holden for none.

But if the party were converſant in the county where he is indicted at the time of the felony or treaſon committed, the proceſs to be, as was at common law.

A *proviſo* not to extend to the king's bench nor *Cheſter*.

By the ſtatute of 10 *H.* 6. *cap.* 6. the ſame proceſs is directed upon indictments of felony or treaſon removed into the king's bench by *certiorari*, or into any other courts.

But as to indictments of felony or treaſon originally taken in the king's bench, they are not within theſe ſtatutes, but by the ſtatute of 6 *H.* 6. *cap.* 1. there is ſpecial proviſion made, that before any *exigent* awarded the court ſhall iſſue a *capias* to the ſheriff of the county, where the indictment is taken, and another to the ſheriff of that county whereof he is named in the indictment, having ſix weeks time or more before the return, and after theſe writs returned the *exigent* to iſſue as before.

[196] Upon theſe ſtatutes, little effect hath been obtaind, for if the party were converſant in the county where the felony or treaſon was committed, (as indeed he cannot be otherwiſe,) then he may be named of that place where the fact was committed in the indictment, and then the proceſs is to go, as at common law before the ſtatutes, and this is the uſual courſe at this day, that if the felony be committed in *A.* in the county of *B.* the indictment runs only, *quòd* J. S. *nuper de* A. *in com'* B. *prædict'* (where the indictment is taken).

And upon the ſame reaſon it is, if *J. S.* be indicted in the county of *B.* for a felony there committed, and the indictment runs thus: J. S. *nuper de* A. *in com'* B. *aliàs* J. S. *nuper de* D. *in com'* S. there ſhall no proceſs go to the ſheriff of S. becauſe that addition is only in the *aliàs dictus*, which is neither material nor traverſable, and therefore proceſs ſhall iſſue only in the county of *B.* where he is indicted, and no *capias* with proclamation in the county of *S.* and the ſame law in an appeal. 1 *E.* 4. 1. *a.*

If *J. S.* be indicted in the county of *B.* in this manner; J. S. *de* A. *in com'* B. *nuper de* C. *in com'* D. the *capias* ſhall iſſue only in the county of *B.* for *there* the indictment ſuppoſeth him actually converſant at the taking of the indictment; but if the indictment runs thus: J. S. *nuper de* A. *in com'* B. *nuper de* C. *in com'* D. in this caſe there ſhall go a *capias* not only into the county of *B.* where he is indicted, but upon the return thereof, (if it be before commiſſioners,) a *ca-*

a *capias* with proclamations to the ſheriff of *D.* and (if in the king's bench upon an indictment originally found there,) one *capias* to one ſheriff, and another to the other ſheriff according to the ſtatutes of 8, 10 and 6 *Hen.* 6. above-named, becauſe he is not named *de* A. in *com'* B. but *nuper de* A. *in com'* B. and *nuper de* C. *in com'* D. and not with an *aliàs dictus*, as in the former caſe. 30 *H.* 6. *Proceſs* 192 *(h)*.

If a man be indicted by the name of J. S. *nuper de* A. *in com' Ceſtriæ*, the ſecond *capias* with proclamation ſhall be awarded to the prince or his lieutenant, 31 *H.* 6. 11. and the like to the biſhop of *Durham*, or chancellor of *Lancaſter*. [197]

There was a very ſharp, yet uſeful ſtatute, 2 *H* 5. *cap.* 9. " If " any perſon make complaint in the chancery of any felony or riot " committed, and that the offender fly or withdraw himſelf to the " intent to avoid execution of the common law, a bill thereof ſhall " be made for the king and deliverd to the chancellor, who, (if he " be duly informed, that ſuch bill containeth truth,) ſhall, at his diſ- " cretion, grant a *capias* to the ſheriff of the county where the of- " fenſe is committed, returnable in chancery at a certain day; and " if the perſons yield themſelves to the ſheriff, they ſhall be com- " mitted or baild, as the caſe ſhall require, and it ſhall be commanded " to inquire of the fact, and thereupon to be done as the law re- " quireth; but if they appear not, then a writ of proclamation to " iſſue to the ſheriff returnable in the king's bench, by which it ſhall " be commanded, that he make proclamation in two counties, that " the parties appear in the king's bench to anſwer the matters in the " bill, (the ſubſtance whereof is to be recited in the writ,) upon " pain to be convict of the offenſe, and if they come not at the day, " to ſtand attaint, and if they come *then*, the fact to be inquired of " as above.

" Provided that the ſuggeſtion of ſuch riots be teſtified to the chan- " cellor under the ſeals of two juſtices of the peace and the ſheriff " of the county before the *capias* granted, the ſubſtance of the com- " plaint to be expreſt in the writ of *capias*, and alſo in the writ of " proclamation." Like proviſion for the counties palatine.

This is marked as an obſolete ſtatute, but I know no act of parliament that repeals it, unleſs it be the implication of the ſtatute of

(*b*) And *Proceſs* 103.

16 *Car.* 1. *cap.* 10. which yet ſeems not to extend to the repeal of theſe ſtatutes, for the chancellor hath no power to hear and determine the offenſes, but only to grant preparatory proceſs to bring them *in* to anſwer according to law, for they are to be proceeded againſt by indictment, if they appear.

[198] Yet this ſtatute hath not been, that I know of, put in ure. 1. Becauſe it ſeems doubtful, whether it extends to murders or robberies, unleſs accompanied with a riot. 2. Becauſe it is left to the diſcretion of the chancellor to iſſue the proceſs. 3. Becauſe ſo many things previous to the proceſs are required, as bill, certificates, probable evidence. 4. Becauſe it takes up ſo much delay, that they may as ſoon be taken up by the ordinary way of indictment and proceſs of outlawry. 5. And eſpecially, becauſe in ſuch caſe the warrant of the chief juſtice or any other judge of the king's bench, upon oath made touching the offenſe and the offenders, reacheth all parts of *England*. 6. Becauſe it is ſo ſevere, for an innocent perſon may be convicted upon default of appearance, and yet have had no notice; but in caſe of an outlawry, tho it be an attainder in itſelf, yet ſmall exceptions are commonly allowed to the proceſs or return, and ſo by writ of error uſually and eaſily reverſible, and the party put to plead to the indictment.

But certainly it might be of great uſe to bring *in* and puniſh notorious offenders, if iſſued diſcreetly and upon great occaſions, provided the parties were firſt indicted by the grand inqueſt.

Now, for the farther declaring the buſineſs of proceſs upon indictments of felony theſe points are conſiderable. 1. Who may iſſue proceſs of outlawry. 2. Againſt whom it is to be iſſued in relation to principals and acceſſaries. 3. What the tenor of the *exigent* and outlawry. 4. What the effect or conſequence of either. 5. How avoided either by diſcontinuance, *ſuperſedeas*, or error.

I. As to the firſt of theſe, namely, who may iſſue proceſs by *capias* and *exigent*.

The court of king's bench either upon an indictment originally taken before them, or removed thither by *certiorari* may iſſue proceſs of *capias* and *exigent* into any county of *England* upon a *non eſt inventus* returned by the ſheriff of the county, where he is indicted, and a *teſtatum*, that he is in ſome other county.

[199] Juſtices of gaol-delivery regularly cannot iſſue a *capias* or *exigent*, becauſe their commiſſion is to deliver the gaol *de priſonibus*

priſonibus in ea exiſtentibus, ſo that thoſe, whom they have to do with, are always intended in cuſtody already; *vide ſupra cap.* 5.

Juſtices of *oyer* and *terminer* may iſſue a *capias* or *exigent*, and ſo proceed to the outlawry of any perſon indicted before them, directed to the ſheriff of the ſame county, where they hold their ſeſſions at common law.

But by the ſtatute of 5 *E.* 3. *cap.* 11. they may iſſue proceſs of *capias* and *exigent* to all the counties of *England* againſt perſons indicted or outlawed of felony before them.

Juſtices of peace may make out proceſs of outlawry upon indictments taken before themſelves, or upon indictments taken before the ſheriff, and returned to the juſtices of peace by the ſtatute of 1 *E.* 4. *cap.* 1. but the power of the ſheriff to make any proceſs upon indictments taken before him is taken away by that ſtatute.

The proceſs to the outlawry, *viz.* the *capias* and *exigent* muſt be in the king's name, and under the judicial ſeal of the king appointed to that court that iſſues the proceſs, and with the *teſte* of the chief juſtice, or chief judge of that court or ſeſſions.

A man is indicted by inquiſition before the coroner, *quære* if he can by law make out proceſs of outlawry; *videtur quòd ſic.* 27 *Aſſiz.* 47. *B. outlawry* 38.

II. Againſt whom proceſs of outlawry ſhall iſſue upon an indictment.

Altho in civil actions between party and party regularly a *capias* or *exigent* lies not againſt a lord of parliament of *England*, whether ſecular or eccleſiaſtical, yet in caſe of an indictment for treaſon or felony, yea, or but for a treſpaſs *vi & armis*, as an aſſault or riot, proceſs of outlawry ſhall iſſue againſt a peer of the realm, for the ſuit is for the king, and the offenſe is a contempt againſt him: And therefore, if a reſcue be returned againſt a peer, 1 *H.* 5. or if a peer of parliament be convict of a diſſeiſin with force, *H.* 32 *Eliz. B. R. Croke, n.* 9. Lord *Stafford*'s caſe *(i)*, or denies his deed, and it be found againſt him, *M.* 38 & 39 *Eliz. B. R.* [200] *Croke, n.* 26. the earl of *Lincoln*'s caſe *(k)*, a *capias pro fine* an *exigent* ſhall iſſue, for the king is to have a fine, and the ſame reaſon is upon an indictment of treſpaſs or riot, and much more in the caſe of felony.

(i) Cro. Eliz. 170. *(k) Cro. Eliz.* 503.

In an appeal by writ againſt principal and acceſſary, becauſe the writ is general and diſtinguiſheth not which is principal and which acceſſary, the proceſs by *capias* ſhall go againſt them all; but if the defendants make default, the plaintiff in the appeal ought to declare which is principal and which acceſſary before the *exigent* iſſues, and then the *exigent* ſhall go only againſt the principal, and if he diſtinguiſheth it not, but prays an *exigent* againſt all, he is concluded to charge any as acceſſary.

But in an appeal by bill or an indictment, the bill or indictment declares which is principal and which acceſſary, and there indeed the proceſs by *capias* is againſt them all, but when it comes to the *exigent*, the *exigent* ſhall iſſue only againſt the principal, and proceſs continue by *capias infinitè* againſt the acceſſary, till the principal be outlawd, and then an *exigent* to iſſue againſt the acceſſary, becauſe *then* the principal is attaint by outlawry; and if the acceſſary appear upon the *capias*, he ſhall be let to bail, and have *idem dies* by bail till the proceſs be determind againſt the principal, and this was the common law, but farther ſettled by the ſtatute of *Weſtm.* 1. *cap.* 14. 2 *Co. Inſtit. p.* 183. and *Stamf. P. C. Lib.* II. *cap.* 17. *fol.* 69 & 70.

If *A.* and *B.* be indicted as principals in felony, and *C.* as acceſſary to them both, the *exigent* againſt the acceſſary ſhall ſtay as before, till both be attainted by outlawry or plea. 40 *Aſſiz.* 25. & 7 *H.* 4. 36. *b.* for it is ſaid, if one be acquitted, the acceſſary is diſcharged, becauſe indicted as acceſſary to both, and therefore ſhall not be put to anſwer till both be attaint. 2 *Co. Inſtit.* 183. *Plowd. Com.* 99. *b. dubitatur*; for tho *C.* be acceſſary to both, he might have been indicted as acceſſary to one, becauſe the felonies are in law [201] ſeveral, but if he be indicted as acceſſary to both, he muſt be proy'd ſo. 4 *Co. Rep.* 44. *b. Vauxe*'s caſe, 47. *b. Waite*'s caſe, 2 *Co. Inſtit. ubi ſupra*; but *vide* 9 *Co. Rep.* 119. *a.* lord *Sanchar*'s caſe *contra per totam Curiam.*

Nota the diverſity ſeems to be between an acceſſary to two principals in an appeal, there he ſhall not be convict, if he be only acceſſary to one; but if *A.* and *B.* be indicted as principals, and *C.* be indicted as an acceſſary to both, if he be found acceſſary to one, he ſhall be convicted, becauſe the king's ſuit; *quære* 8 *H.* 5. 6. *b.* 9 *Co. Rep.* 119. *a.* lord *Sanchar*' caſe (*).

(*) *Vide ſupra, Part* I. *p.* 624.

III. As

III. As to writ of *exigi facias*, and the return thereof.

If the defendant render himſelf to the ſheriff before the *quinto exactus*, and appear in court at the return of the *exigent* and plead, and is bailed to attend the trial, and then make default, the inqueſt ſhall not be taken by default in any caſe of felony, either upon an indictment or an appeal, tho it may in other caſes, but a new *capias*, and after *that* an *exigent* ſhall iſſue, and a *capias* againſt the bail. 19 *E.* 3. *Exigent* 10.

If an *exigi facias* be delivered to the ſheriff, and there are but two county-courts before the return, and the ſheriff return the firſt and ſecond *exactus & non comparuit*, and that there were no more county-days between the delivery of the writ to him and the day of the return, there may iſſue a ſpecial *exigi facias* with an *allocato comitatu*, if it be prayed, after the return, and before any new county-day be paſt, but if any county-day be paſt between the laſt of the former county-days and the return, no *exigi facias* ſhall iſſue with an *allocato comitatu*, but an *exigi facias de novo*, for the demand of the party muſt be at five county-courts ſucceſſively held one after another without any county-court intervening, 22 *E.* 3 11. *a.* ſo if after the ſecond *exactus* the offender render himſelf and finds mainprize, and at the day of the return makes default, *exigi facias* with an *allocato comitatu* ſhall iſſue, becauſe three county-days intervened, but a new *exigent* and a *capias* againſt the bail, 22 *E.* 3. *ubi ſupra*, and 32 *E.* 3. *Exigent* 14. [202]

And therefore in *London*, where the holding of the huſtings is uncertain, no *exigi facias* ſhall iſſue with an *allocato huſting'*, becauſe the court cannot take notice of the ſet times of holding it, as they may of the times of holding the county-court. 21 *E.* 3. 35. *b.* 17 *E.* 3. 43. *b.* *Exigent* 11. but *vide contrarium* at this day an *allocato huſting'*, *H.* 19 *Jac. B. R. Archer* and *Dalby (l)*, where it was agreed, that if an *exigent* iſſues in *London*, and they begin in huſting *de placito terræ*, (as they may) they ſhall proceed along at that huſtings to the outlawry, without mingling their huſtings *de communibus placitis*; but if an *allocato huſting'* comes, they ſhall proceed without omitting any huſting.

If the offender appear at the *capias* and pleads to iſſue, and is then let to bail to attend his trial, and then make default, the inqueſt in caſe of felony ſhall never be taken by default, but a *capias ad audien-*

(*l*) *Palm.* 278.

dam juratam ſhall iſſue, and if he be not taken, an *exigent*, *vide* 26 *Aſſ.* 51. *Coron.* 196. and if he appeared upon the *exigent* and then made default, an *exigi facias de novo* ſhall iſſue. 16 *Aſſ.* 13.

But, if upon the *capias* or *exigent* the ſheriff returns *cepi corpus*, and at the day hath not his body, the ſheriff ſhall be puniſhed, but no new *exigent* awarded, becauſe in cuſtody of record. 30 *Aſſiz.* 23. but if the party be returned outlawd, the proceſs thereupon is a *capias utlegatum*.

And that I may ſay is once for all, as well this proceſs of *capias utlegatum* as all other proceſs upon an indictment, and generally all proceſs for the king are with a *non omittas propter aliquam libertatem*.

And therefore, by virtue of theſe proceſſes, the ſheriff may enter into any liberty to execute the ſame.

And if the party be in his own houſe, or in the houſe of any other, if the doors be ſhut, and the ſheriff having given notice of his proceſs demand admittance and the doors be not opened, he may break open the doors and enter to take the offender. 5 *Co. Rep.* 91. *b. Semayne's* caſe, *& libros ibidem.*

[203] Nay farther, if a party outlawd be in a houſe, and the door be refuſed to be opened, the conſtable, or any other perſon in purſuit of the felon, may break open the doors and apprehend a perſon outlawed or indicted of felony.

The return of the outlawry muſt be certain.

It muſt ſhew where the county-court was held, and in what county, therefore *ad comitatum meum* S. *tent. apud* C. and ſays not *in comitatu prædicto* or *in com'* S. is erroneous. 11 *H.* 7. 10. *a. dubitatur.*

The like if it be *ad comitatum meum tentum apud* S. *in com'* Somers', and ſays not *ad comitatum meum* Somers', or *ad comitatum* Somers', without ſaying *ad comitatum meum* Somerſet. *P.* 7. *Jac. B. R.* adjudged, *Whiting's* caſe *(m)*. 6 *H.* 7. 15. *b.* 11 *H.* 7. 10. *a.*

And yet in that caſe at the deſire of the king's attorney, in caſe of an outlawry of felony a *certiorari* iſſued to the coroners to certify the truth, and thereupon the return was amended according to a like precedent in the time of *E.* 4. *T.* 3 *Car. B. R. Plum's* caſe *(n)*.

The ſheriff muſt return the day and year of the king to every *exactus*.

If the day and year of the king be inſerted in the 1, 2, 3 and 5 *exactus*, but omitted in the 4th *exactus*, it is erroneous, and ſhall not be

(*m*) 2 *R. A. p.* 802. *pl.* 2. (*n*) *Palm.* 480. *Latch* 210.

ſupplied

ſupplied by intendment. *M.* 14 *Jac. B. R. Chapman's* caſe adjudged *(o)*.

So if it be *anno regni dominæ reginæ* without ſaying *Elizabethæ*, or *dominæ Elizabethæ* without ſaying *reginæ*. *P.* 7 *Jac. C. B. Burford's* caſe *(p)* and *Brandling's* caſe *(q)*, or *anno regni domini regis Jacobi* without ſaying *regni ſui Angliæ*, for the year of *England* and *Scotland* differ. *H.* 7. *Jac. Pen's* caſe *(r)*, ſo if there be leſs than a month betweeen the firſt and ſecond *exactus*. *H.* 13 *Jac. B. R. Taverner's* caſe *(s)*.

Ad huſting tent' apud Guildhall civitatis London without ſaying *de communibus placitis* is erroneous, becauſe they have two huſtings, one *de communibus placitis*, another *de placitis terræ*. [204] 6 *H.* 7. 15. *b.* 11 *H.* 7. 10. *a.*

So if an *exigent* be againſt *A.* and *B.* and the return is *primo exactis fuerunt & non comparuerunt* without ſaying *nec eorum aliquis comparuit*, it is erroneous. *H.* 13 *Jac. B. R. Taverner's* caſe adjudged *(t)*, & *ſæpius alibi*.

If there be two coroners in a county, the calling upon the *exigent* may be by one of them, and likewiſe one alone may give the judgment of outlawry. 14 *H.* 4. 34. *b. per Hankf.* 39 *H.* 6. 40. *b.*

But it ſeems the return muſt be by two in miniſterial acts. 14 *H.* 4. 34. *b.* 39 *H.* 6. 40. *b.*

The name of the coroner muſt be ſubſcribed to the judgment of outlawry at the *quinto exactus*. *M.* 9 *Car. B. R. Ethrington's* caſe upon an outlawry of felony, and it muſt be ſubſcribed alſo by the name of their office *A. B.* and *C. D. coronatores*, unleſs in *London*, where the mayor is coroner. *M.* 13 *Jac. B. R. Earle's* caſe *(u)*. *P.* 17 *Jac. Croke*, *n.* 11. *Garrard's* caſe *(x)*.

The ſheriff's name and office muſt alſo be ſubſcribed to the return of the *exigent*, *e. g. A. B. armiger, vicecomes*.

IV. As to the effect of the *exigent* or outlawry in treaſon or felony.

1. As to the *exigent* the very iſſuing of the writ of *exigent* in caſe of treaſon or felony gives to the king or the lord of a franchiſe, to whom that liberty is granted, the forfeiture of all the goods of the party ſo put in *exigent* from the time of the *teſte* of the writ of *exigent*. 44 *Aſſiz.* 13.

(o) 2 *R. A. p.* 803. *pl.* 1.
(p) *Ibid. p.* 802. *pl.* 6.
(q) 2 *R. A. p.* 802. *pl.* 7.
(r) *Ibid. p.* 802. *pl.* 8.
(s) *Ibid. p.* 802. *pl.* 5.
(t) 2 *R. A. p.* 802. *pl.* 1.
(u) *Ibid. p.* 802. *pl.* 3 & 4.
(x) *Cro. Jac.* 531.

And

And therefore, if in an appeal the *exigent* be well awarded, tho the writ of appeal be abated, the forfeiture of the goods by the *exigent* ſtands in force. 43 *E.* 3. 17. *b.* *Stamf. P. C. Lib.* III. *cap.* 22. *fol.* 184. *b.*

And tho the outlawry be reverſed for error in law or in fact, as if the party were impriſond at the time of the outlawry and after the [205] *exigent*, whereby the outlawry is reverſed, yet the *exigent* being well awarded the forfeiture of the goods ſtands. 19 *E.* 3. *Forfeiture* 19. 30 *H.* 6. *ibid.* 31.

And therefore a ſpecial writ of error lies even upon the award of the *exigent* for the party ſo put in *exigent* or his executors to reverſe the award of the *exigent*, if it were erroneouſly awarded for error in law or error in fact. *M.* 33 & 34 *Eliz. B. R.* *Marſhe's* caſe *adjudged*, cited in *Foxley's* caſe, 5 *Co. Rep.* 111. *a.* but not without reverſal by writ of error. *Ibid.* As if he were in priſon, or beyond the ſea, or had a charter of pardon before the *exigent* awarded, and thereupon the very award of the *exigent* ſhall be reverſed, and the party reſtored to his goods, and ſo it is for matter of law, as if the *exigent* iſſued againſt the acceſſary before the principal attainted. *Stamf. ubi ſupra.*

But the avoiding only of the outlawry avoids not the *exigent* if well awarded, nay altho the party render himſelf after the *exigent* awarded, and plead to the indictment, and is found not guilty, yet the forfeiture by the *exigent* ſtands in force. 22 *Aſſiz.* 81.

Therefore it is neceſſary for a party outlawd in felony to bring his writ of error ſpecially *tam in adjudicatione brevis de exigi facias, quàm in promulgatione utlegariæ*, for tho the outlawry be reverſed, it doth not reverſe the award of the *exigent*.

But error in the *exigent* is cauſe to reverſe the outlawry, and error in the appeal or indictment, upon which the *exigent* is awarded, is cauſe to reverſe both outlawry and *exigent*.

But without a judgment of reverſal in a writ of error the forfeiture by the *exigent* awarded ſtands, tho the indictment be quaſhed or the appeal abated, becauſe the king's title being of record muſt be avoided by a record, and ſo are the books of 41 *Aſſiz.* 13, 43 *E.* 3. 17. *b.* to be reconciled, *vide Foxley's* caſe, *ubi ſupra.*

2. As touching the forfeiture by outlawry. Outlawry of treaſon or felony is a conviction and attainder of the offenſe charged in the indictment.

And

And as the award of the *exigent* gives the forfeiture of the goods, ſo the outlawry gives the forfeiture or loſs of the lands of the party outlawd, *viz.* in caſe of outlawry of treaſon his lands are forfeited to the king, of whomſoever they are held, and in caſe of outlawry of felony to the lord by eſcheat, of whom they are immediately holden.

But it muſt be remembred, that the bare judgment of outlawry by the coroners without the return thereof of record is no attainder, nor gives any eſcheat. *Co. Lit.* §. 197. *fo.* 128. *b.* 28 *Aſſiz.* 49.

But it muſt be returned by the ſheriff with the writ of *exigi facias*, and the return indorſed.

And therefore, if there be a *quinto exactus*, and thereupon *utlegatus eſt per judicium coronatorum*, but no return thereof is made, there lies a writ of *certiorari* to the coroners, 9 *H.* 4. 7. *b.* 36 *H.* 6. 24. *b.* *Dy.* 223. *a.* or to the ſheriff and coroners, *Regiſter* 284. *a.* 38 *E.* 3. 14. *b.* *vide Dy.* 317. *a.* to certify the outlawry into the king's bench, but this is only either to ground a charter of pardon upon it, 9 *H.* 4. 7. *b.* or to amerce the ſheriff, where he returned only a *quarto exactus* when it was *quinto exactus*, 36 *H.* 6. 24. *b.* but of what effect it is otherwiſe, there ſeems diverſity of opinions: I think as followeth.

1. That it doth not diſable the party to bring an action, becauſe in relation to party and party it ſtands as nothing, till returned by the ſheriff. *Mich.* 14 & 15 *Eliz.* *Dy.* 317. *a.* *Puttenham*'s caſe.

2. That conſequently, barely upon ſuch a return of an outlawry upon a *certiorari*, without the writ of *exigent* indorſed and returned together with the *certiorari*, it ſeems no writ of eſcheat lies for the lord; *quære.*

3. But if the writ of *certiorari* be directed to the ſheriff and coroners, and the writ of *exigent* be extant in court, and they return this outlawry, poſſibly this may be a ſufficient warrant to enter it of a record, as a return upon the *exigent*, for the king's advantage, and to iſſue upon it a *capias utlegat'*. 38 *E.* 3. 14. *b.* to have the forfeiture of his goods. 14 & 15 *Eliz.* *Dy.* 317. *a.* *Co. Lit. fol.* 288. *b.* 37 *H.* 6. 17. *a.* *vide Proctor*'s caſe. *P.* 5 *Eliz.* *Dy.* 223. *a.* [207] And *Stanley*'s caſe there cited out of 18 *E.* 4. to this purpoſe.

4. But unleſs the writ is ſome way returned or extant, I think it gives the king no title to land or goods, for the writ of *exigi facias* is

is the warrant of the outlawry, and *that* which gives the coroners their authority in such a case to give judgment of outlawry.

And it is not like the case, where there was once a writ and return of outlawry, and the record since lost, for that upon circumstances a jury upon the general issue may find a record, tho not shewn in evidence; but here the writ was never in truth indorsed nor returned.

5. But if the writ of *certiorari* were directed to the coroners alone, tho it may be a ground to cause the sheriff to mend his return and make it according to the truth, yet the certificate of the coroners will not make a record to intitle the king or lord to any thing without the writ of *exigent* extant, and the return upon it amended by the sheriff, for without the *exigi facias* and the return of the outlawry upon it, I think there is neither disability, forfeiture, nor escheat, and therefore *P.* 8 *Jac. C. B.* a *certiorari* shall not be so much as granted to the coroners to remove an outlawry after the parties death. Sir *John Fit*'s case.

V. Touching the avoiding of the outlawry, it is to be done either by plea or by writ of *identitate nominis*, or by writ of error.

1. By plea, where the record of the outlawry is not avoided but made good against another person, as where the outlawry is against *J. S. de B.* and the party taken upon it is another person of another addition, as *J. S. de C.* or *J. S. junior*, &c. *vide* 19 *H.* 6. 58. *a.* 10 *E.* 4. 16. *a.* 20 *H.* 6. 19. *a.*

2. By writ of *identitate nominis*, *vide F.N.B.* 267. 20 *E.* 3. *Brief* 683. 14 *H.* 4. 27. *a.*

3. By writ of error, for it is a judgment of record and must be avoided by record.

The errors assignable are either errors in law, whereof before, or errors in fact, which are many, as if the party outlawd were an infant under fourteen years old in case of felony. *Dy.* 104. *b.* 3 *H.* 5. *Utlagarie* 11.

[208]

So if he were imprisoned at the time of the outlawry, unless being brought to the bar and demanded, if he will appear, and he refuse it. *M.* 8 *Jac. C. B.* 1 *H.* 7. 13. 21 *E.* 4. 73. *b.*

As touching avoiding of an outlawry of felony, because beyond the sea. *H.* 15 *Jac. B. R. Carter*'s case *(y)*, these differences were

(y) 2 *R. A.* 804. *pl.* 2, 3, 4, 5.

agreed

agreed by the court, whereby the differing books are reconciled upon view of divers precedents.

1. If a man having committed a felony goes beyond the ſea voluntarily, or upon his own occaſions, and not in the king's ſervice before any *exigent* awarded, tho after the indictment, and then an *exigent* is awarded, and the offender being beyond the ſea is outlawd for the felony, he may aſſign it for error.

2. But if after the *exigent* awarded upon the indictment of felony, then he goes beyond the ſea voluntarily or upon his own occaſions, and being ſo beyond ſea is outlawd, he ſhall not avoid it by ſuch being beyond ſea, becauſe the *exigent* awarded gives him notice of the proſecution, and by ſuch a means he may avoid his conviction by ſtaying till all the witneſſes are dead.

3. But if *primâ facie* the error in that caſe is well aſſigned, by alleging he was *ultrà mare tempore promulgationis utlegariæ*, and if he were in the realm after the *exigent* iſſued, it ſhall come *in* by the plea of the king's attorney to ſhew it.

4. But if he were within the realm at the time of the *exigent* iſſued, and went beyond ſea upon the ſervice of the king or kingdom, and then is outlawd being beyond ſea, this outlawry ſhall be reverſed, and if the party allege generally, that he was *ultra mare tempore promulgationis utlegariæ*, and the king's attorney reply, that he was in *England tempore emanationis brevis de exigi facias*, it is a good replication for the plaintiff in the writ of error to allege, that he went out after the *exigent* and before the outlawry pronounced upon the king's command or ſervice, and ſhew it ſpecially, and ſo confeſs and avoid the plea.

And it is to be obſerved, that altho the death of the king doth not diſcontinue the indictment, yet the king's death [209] pending the proceſs and before the outlawry diſcontinues the proceſs, and this is not aided by the ſtatute of 1 *E.* 6. *cap.* 7.

Upon a writ of error upon an outlawry in felony, the record of the outlawry *cum omnibus ea tangentibus* is removed into the king's bench, wherein theſe things are obſervable.

1. That the party outlawd muſt render himſelf in cuſtody, and in cuſtody muſt come in perſon to the bar, and when he is demanded what he can ſay, he is in perſon to pray allowance of the writ of error.

2. The

2 The writ being allowd the record is to be removed, namely the indictment, proceſs, and return, and outlawry, he is then to aſſign his errors in perſon, and a day is given to the king's attorney to reply to him, and in the mean time a *ſcire facias* to the lords mediate and immediate is to iſſue returnable at fifteen days *ad audiendum errores.*

3. If any lords do appear, they may plead to the errors; if the ſheriff return there are no lands, *&c.* then the court proceed to examine the errors.

4. The outlawry being reverſed he is put to anſwer the indictment, and may plead to it, and be tried at the king's bench bar, or the record may be remitted into the country, if it were removed into the king's bench by *certiorari*, with a command to the juſtices below to proceed by the ſtatute of 6 *H.* 8. *cap.* 6. *de quo ſupra, p.* 3.

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[210] CHAP. XXVII.

Touching certiorari *out of the king's dominions.*

THO a writ of *certiorari* be not properly or directly a proceſs upon an indictment, yet it has relation to it, and in order to the full underſtanding of the pleas of the crown is neceſſary to be conſidered.

The king's bench is the ſovereign ordinary court of juſtice in cauſes criminal, and therefore may iſſue a *certiorari* unto inferior juſtices to remove indictments or appeals, and that is done for ſeveral ends.

1. Sometimes to conſider and determine the validity of indictments, and to quaſh or affirm them, as there is cauſe.

2. Sometimes to have the priſoner or offender tried either at the bar, or by *niſi prius* before the king's juſtices of the courts of *Weſtminſter.*

3. Sometimes to examine, and affirm or reverſe the proceedings and judgments given by inferior judges, for it was frequent heretofore to have the record removed by *certiorari* firſt, and then a writ of error, *quod coram vobis reſidet*, tho it is now ordinarily done together by writ of error.

4. Sometimes to plead the king's pardon.

5. Some-

5. Sometimes to iſſue proceſs of outlawry againſt the offender in thoſe counties and places where the proceſs of inferior juſtices cannot reach them.

Tho this be uſual to remove records of indictments by *certiorari*, yet the chancellor may deliver an indictment removed before him, or the juſtices of peace, or other commiſſioners of *oyer* and *terminer* or gaol-delivery may deliver indictments taken before them *manibus propriis* without writ, and ſuch a record ſo removed, and a record made of it removes the record.

If there be an indictment to be removed and the party be in cuſtody, it is uſual to have an *habeas corpus* to remove the priſoner, and a *certiorari* to remove the record, for as the *certiorari* alone removes not the body, ſo the *habeas corpus* alone removes not the record itſelf, but only the priſoner with the cauſe of his commitment, and therefore altho upon the *habeas corpus* and the return thereof the court can judge of the ſufficiency or inſufficiency of the return and commitment, and bail or diſcharge, or remand the priſoner, as the caſe appears upon the return, yet they cannot on the bare return of the *habeas corpus* give any judgment, or proceed upon the record of the indictment, order, or judgment, without the record itſelf be removed by *certiorari*, but the ſame ſtands in the ſame force it did, tho the return ſhould be adjudged inſufficient, and the party diſcharged thereupon of his impriſonment, and the court below may iſſue new proceſs upon the indictment, tho it be otherwiſe in an *habeas corpus* in civil cauſes, for it is a *ſuperſedeas*, and cloſeth up the hands of the inferior court in civil cauſes. [211]

By the ſtatute of 1 & 2 of *P. & M. cap.* 13. an *habeas corpus* or *certiorari* to remove a priſoner or a recogniſance ought to be ſigned with the proper hand of the chief juſtice, or in his abſence by one of the juſtices of the court, out of which it iſſues.

By the ſtatute of 21 *Jac. cap.* 8. all *certiorari's* to remove indictments before juſtices of the peace, ſhall be deliverd at the quarter-ſeſſions in open court, and the party indicted ſhall become bound with ſufficient ſureties in ten pounds to the proſecutor, with condition to pay him ſuch charges as the juſtices of peace ſhall aſſeſs, if the party be convicted, otherwiſe the juſtices of peace may proceed to trial notwithſtanding ſuch *certiorari*.

A *certiorari* may iſſue to the juſtices of a county palatine, or to the mayor of the *cinque ports* to remove an indictment taken before them,

and

and muſt not be directed to the chancellor of *Durham*, &c. or warden of the *cinque ports*, for now by the ſtatute of 27 *H.* 8. *cap.* 24. all commiſſions of the peace, gaol-delivery, *oyer* and *terminer*, &c. are to be made in the king's name, and theſe juſtices in criminal

[212] cauſes are immediately ſubject to this court, as other juſtices of like nature elſewhere are; and if they return a privilege of the county palatine or *cinque ports* upon the *certiorari*, it ſhall not be allowed, but an *aliàs certiorari* ſhall iſſue with a precept to produce their charters, by which they claim ſuch exemption, *P.* 43 *Eliz. B. R. Rot.* 119. *T.* 8 *Car. B. R. (a)*, and *M.* 8 *Car. B. R. (b)* upon an indictment of ſodomy in the *cinque ports*. *T.* 1653. *Rutabie's* caſe upon an indictment of murder in *Durham (c)*.

A *certiorari* iſſues bearing *teſte* the laſt day of *Trinity term* to remove all indictments againſt *A.* and *B.* returnable *tres Michaelis*; at the quarter-ſeſſions it is deliverd, and then an indictment is found againſt *A. B.* and *C.*

Ruled 1. That tho the delivery of a *certiorari* ſuperſedes the proceeding upon an indictment, yet it doth not hinder the taking of an indictment after the delivery of the writ.

2. Altho the indictment be taken after the *teſte* of the *certiorari*, and before or after the delivery thereof, yet all ſuch indictments againſt *A.* and *B.* ought to be removed, and the juſtices below cannot proceed upon ſuch indictments to trial, judgment, or execution; and if they do, it makes their proceedings erroneous and void, and likewiſe ſubjects the juſtices to an attachment for the contempt, whether they proceed at the ſame ſeſſions, or a private ſeſſions after.

3. That ſuch a *certiorari* to remove all indictments againſt *A.* and *B.* removes all indictments wherein *A.* or *B.* are indicted either alone or together with any other perſon. *M.* 22 *Car.* 1. *B. R. Orſener's* caſe *(d)* adjudged. 1 *R.* 3. 4. *b.* 6 *H.* 7. 16. *a.*

If *A. B.* and *C.* are indicted (ſuppoſe for a battery), ruled, 1. Tho *A.* alone tenders ſecurity for the coſts, it is ſufficient within the ſtatute, and the record ought to be removed into the king's bench. 2. If the indictment be at a private ſeſſions, this indictment ought to be deliverd into the quarter-ſeſſions, yet the delivery of the *certiorari* at

(a) Hopſtil Tilden's caſe, 1 *R. A.* 395. *pl.* 6.
(b) Dugdale's caſe. *ibid.*
(c) Vide ſupra, Part I. *p.* 467. and alſo *Simpſon's* caſe, 1 *R. A.* 395. *pl.* 5.
(d) The ſame points reſolved in *Cheney's* caſe, 1 *R. A.* 395. *pl.* 1, 2.

the

the private ſeſſions cloſeth the hands of the juſtices, altho the allowance of the writ and the tender of the ſecurity muſt be by the ſtatute at the quarter-ſeſſions. *M.* 1653. *B. R.* adjudged.

Nota, *T.* 15 *Car.* 1. *B. R.* in *Hancock*'s caſe theſe points were reſolved. 1. That if many are indicted, and one only tenders ſureties for the coſts upon the ſtatute of 21 *Jac.* it is ſufficient.

2. If the ſurety be ſufficient as to 10*l.* that is a ſufficient ſurety, and ought to be allowed by the juſtices of peace.

3. A *feme covert* is not within the ſtatute of 21 *Jac.* to find ſureties.

4. If a *certiorari* iſſue and ought to be allowd, the proceeding of the juſtices after is *coram non judice.*

5. It was reſolved *M.* 4. *Car.* that the removal of an indictment of forceable entry by the proſecutor is not within the ſtatute of 21 *Jac.*

And ſo *note* a difference between a writ of error and a *certiorari*, the former is a *ſuperſedeas* to the iſſuing of execution from the time of the delivery of the writ till the day of the return be paſt, but then if the plaintiff proceed not to the removal of the record, execution ſhall be granted for his delay; but a *certiorari* is a *ſuperſedeas* from the time of the delivery thereof for ever, unleſs a *procedendo* iſſue. 21 *H.* 6. 28. *b.* *Dy.* 245. *a.*

If at the ſeſſions of the peace an indictment of forceable entry be, and reſtitution be awarded, and after the ſeſſions and before reſtitution actually made a *certiorari* is delivered to one juſtice of peace, before the ſtatute of 21 *Jac.* it cloſed up their hands, and no reſtitution ſhall be awarded, but the juſtice ought to make a *ſuperſedeas* thereupon.

And it ſeems the ſame law ſtill remains at this day upon indictments of forceable entry found at private ſeſſions, becauſe the juſtices make execution thereupon before any quarter-ſeſſions come by virtue of the ſtatute of 8 *H.* 6. *cap.* 9. and if the *certiorari* ſhould not be obeyed, it would be fruitleſs.

If *A. B. C.* and *D.* be actually indicted in one indictment for one offenſe, and a *certiorari* be to remove all indictments againſt *A.* and *B.* this will be ſufficient to remove the indictment [214] againſt *A.* and *B.* and alſo it removes the indictment as to *C.* and *D.* for the juſtices may deliver the indictment *per manus proprius*. *M.* 37 & 38 *Eliz. B. R. Woodward*'s caſe, *contra* 6 *E.* 4. 5. *a.*

But if the indictment be but one, but the offenſes ſeveral, as if *A. B. C.* and *D.* be indicted by one bill for keeping ſeveral diſorderly houſes, a *certiorari* to remove this indictment againſt *A.* and *B.* re-

moves not the indictment as to *C.* and *D.* for tho they are all compriſed in one bill, yet they are ſeveral indictments and ſeveral offenſes, and ſo the record is in the king's bench virtually and truly as to *A.* and *B.* but as to *C.* and *D.* the record remains below.

But if the juſtices *per manus ſuas proprias* deliver the bill into court againſt all of them as they may, then if a record be made of that delivery, the indictment is entirely removed againſt *A. B. C.* and *D.* becauſe not done upon the writ of *certiorari*, but *per manus ſuas proprias:* But otherwiſe it is, where the offenſes are ſeveral, and the indictment againſt *A.* and *B.* is removed by writ, and by a return indorſed upon the writ, for then that ſingle indictment, that concerns *A.* and *B.* is removed, and not the others, where the offenſes are ſeveral, and ſeverally charged.

But as I ſaid, if there be one indictment againſt *A. B. C.* and *D.* for one murder or burglary, another againſt the ſame perſons for robbery, and a third againſt the ſame perſons for a rape, a *certiorari* to remove all indictments againſt *A.* and *B.* removes all theſe ſeveral indictments againſt *A. B. C.* and *D.* for tho in law each of them be ſeverally a felon, yet inaſmuch as they are jointly charged they ſhall be all removed as to *A. B. C.* and *D.* by virtue of this one writ, contrary to the opinion of *Markham.* 6 *E.* 4. 5. *a.*

And yet in ſome caſes variance between the *certiorari* and the record cauſeth the record not to be removed, as if the *certiorari* be to remove the record of an inquiſition *in curiâ noſtrâ*, whereas it was *in curiâ* of the predeceſſor, the record is not removed. 3 *Eliz. Dy.* 206. *b.*

[215] So if it be to remove an indictment for ſtealing of two horſes, and the record is but for one. 3 *Aſſiz.* 3. *Plow. Com.* 393. *a.*

If a *certiorari* iſſue, it is a *ſuperſedeas* in law, and it makes judicial proceedings after the *certiorari* delivered erroneous, but poſſibly it makes miniſterial proceedings, as the award of reſtitution in a forceable entry, void alſo; *vide* 6 *H.* 7. 16 *a. per Keble*, altho it doth not remove the record before the return. *Dy.* 245. *a.*

After a *certiorari* iſſued and delivered, and before the record removed the inferior judge may be enabled to proceed by a *procedendo* or *ſuperſedeas* of the *certiorari* iſſuing out of the court of king's bench.

But if the record be removed and filed in court, at common law no *procedendo* could be granted, neither could the record be remitted, but now by the ſtatute of 6 *H.* 8. *cap.* 6. the court of king's bench may

remand

remand the record, and command the judges below to proceed upon the indictment ſo remitted.

And *note* the difference between a *certiorari* in the king's bench and chancery: In the king's bench the very record itſelf is removed, and that which remains in the court below is but a ſcroll. But uſually in chancery, if the *certiorari* be returnable there, they remove but the tenor of the record, and therefore if the tenor of a record of an indictment, or attainder, or conviction be removed by *certiorari* into the chancery, and thence ſent by *mittimus* into the king's bench, they cannot thereupon proceed either to judgment or execution, becauſe they have only the tenor of the record before them, and not the record itſelf, as in the former caſe. *Vide* 37 *H.* 6. 17. 39 *H.* 6. 4. *Dy.* 217. *a.* 2 *E.* 3. 21. *a.* (*e*).

(*e*) *Vide Dyer* 369. *b.*

Bum. Tit. Certiorari. 4. Blackſ. Com. ch. 19. p. 262. 265. 272. ch. 24. pa. 320, 321. Index to 2 Hawk. P. C. Tit. Certiorari. See the ſeveral Index's of 1, 2, 3, & 4. Reports of Sir James Borrow, & Rep. tempt. Lord Hardwicke 396.

CHAP. XXVIII. [216]

Touching the arraignment of offenders *in capital offenſes.*

IN the former chapter I have ſhewed how the priſoner is to be accuſed, namely, by indictment, and how to be brought in by proceſs to his anſwer, and how to be dealt with, if he make default, or ſtand out againſt the proceſs of law.

I am now to conſider how he is to be proceeded againſt, if he be taken, or render himſelf, and appear in court.

For in caſe of an indictment of treaſon or felony no offender can appear by attorney, but in perſon, tho in ſome caſes of other indictments after plea pleaded, the defendant may appear by attorney. 9 *E.* 4 4. *a.* 22 *Aſſiz.* 73. *B. Attorney* 63.

When the offender in treaſon or felony comes into court, or is brought in by proceſs, ſometimes of *capias*, and ſometimes of *habeas corpus* directed to the gaoler of another priſon, the firſt thing that follows thereupon, is his arraingment.

And herein I will conſider, 1. What the arraingment of a priſoner or malefactor is. 2. How it is performed, and in what manner. 3. When it is to be done.

I. Arraignment therefore is nothing elſe but the calling of the offender to the bar of the court to anſwer the matter charged upon him by indictment or apppeal.

And the word in *Latin* is no other than *ad rationem ponere*, and in *French ad reſon*, or abbreviated *a reſn*, for as the *vox forenſis diſrain* or *derayn* uſed antiently in our books *de ceo tend ſuit & derayne* imports in *Latin diſrationare* to diſprove or evince the contrary of any thing, that [217] is or may be affirmed, ſee *Spelman*'s *Gloſſ.* tit. *Dirationare*, *and Selden*'s notes upon *Forteſcue*, *cap.* 21. *p.* 23. ſo *arraigne* is *ad rationem ponere* to call to account or anſwer.

And this appears to be the true ſenſe and etymology of the word, by the excellent record of the reverſal in parliament of the judgment given againſt the *Mortimers*, *E.* 2. the reverſal and whole record is entered *verbatim Patents* 1 *E.* 3. *part* 2. *m.* 3. where there are three errors aſſigned in that arbitrary judgment, and all ruled in parliament to be errors, and the attainder reverſed. 1. *Quòd cum aliquis de regno regis tempore pacis deliquerit erga dominum regem vel alium, per quod debeat vitam vel membrum perdere, & ſuper hoc coram judicibus in judicium ductus fuerit, primò debeat poni rationi & ſuper delicto ſibi impoſito reſponſiones ipſius audiri, priùs quam procedatur ad judicium de eo; ſed in recordis & proceſſibus præactis continetur, quòd prædicti* Rogerus & Rogerus *coràm juſtic' ducti adjudicati fuerunt judicio tractûs & ſuſpendii, & poſtea perpetuæ priſonæ adjudicati & mancipati abſque hoc, quòd ipſi fuiſſent inde arrenati, ſeu quòd ipſi ad aliqua eis impoſita reſpondere poſſint, quod eſt contra legem & conſuetudinem regni, &c. per quod ad judicium de eis erronicè proceſſum eſt.*

2. *Dicit etiam quòd in recordis & proceſſibus prædictis continetur, quòd dominus rex recordabatur verſus ipſos* Rogerum & Rogerum, *quòd ipſi hoſtiliter equitaverunt cum* Humfredo de Bohun *nuper com'* Heref. *& aliis inimicis domini regis contra ipſum regem & populum regni ſui diverſa mala & facinora perpetrando, quare judicia prædicta ſuper eiſdem reddita fuerunt, cujuſmodi recorda non eſt domino regi facere, niſi de inimicis ſuis tempore guerræ, & hoc, viz. quando idem dominus rex equitat cum vexillis explicatis, & non tempore pacis, ſed eo tempore dominus rex non equitavit cum vexillis explicatis, nec fuit tempore guerræ, cancellaria domini regis & juſticiariis placearum de utroque banco ſedentibus*

bus ad juſtitiam unicuique conqueri volenti & proſquenti faciend', per quod ad judiciam de eis, ut prædictum eſt erronicè proceſſum eſt. 3. Dicit etiam quòd erratum eſt in hoc, quòd, cum in Magna Charta de libertatibus Angliæ *continetur, quod nullus liber homo capiatur, aut impriſonetur, aut de libero tenemento ſuo diſſeiſietur, vel de libertatibus vel liberis conſuetudinibus ſuis, aut utlegatur, aut exulet, aut aliquo modo deſtruatur, nec dominus rex ſuper eum ibit, nec ſuper eum* [218] *mittet, niſi per legale judicium pariùm ſuorum vel per legem terræ, ſed in recordis & proceſſibus prædictis continetur, quòd prædicti* Rogerus & Rogerus *figillatim judicio tractûs & ſuſpendii adjudicati fuerunt, & poſtea perpetuæ priſonæ adjudicati & mancipati abſque legali judicio pariûm ſuorum ad hoc vocatorum, & contra legem terræ.* And thereupon judgment of reverſal is given in theſe words, *Et quia inſpectis recordis & proceſſibus prædictis compertum eſt in eiſdem, quòd prædicti* Rogerus Mortimer & Rogerus Mortimer *coram juſtic' ducti judicio tractûs & ſuſpendii adjudicati fuerunt, & poſtea perpetuæ priſonæ adjudicati & mancipati abſque hoc, quòd ipſi ad aliqua eis vel eorum alteri impoſita poſſint reſpondere, & hoc tempore pacis, & abſque hoc, quod dominus rex equitavit cum vexillis explicatis, & cancellario domini regis & juſtic' de utroque banco ſedentibus, ut prædictum eſt, & abſque legali judicio pariûm ſuorum, quod eſt contra legem & conſuetudinem regni* Angliæ *& tenorem Chartæ prædictæ, conſideratum eſt per dominum regem nunc & ejus concilium in pleno parliamento, quod omnia judicia prædicta ob defectus & errores prædictos & alios in recordis & proceſſibus prædictis compertos revocentur, &c.*

I have tranſcribed the record more at large, becauſe there are many uſeful parts in it, ſome whereof will be uſeful to other purpoſes.

But as to the buſineſs in queſtion, theſe two things are obſerveable. 1. What arraigment is, namely, it is *ad rationem ponere*, for that which in one part of the record is *arrenatus*, is before rendered *rationi ponere*, to be put to anſwer; and therefore *Spelman*, who is ſeldom miſtaken, is yet herein miſtaken, both in the nature, orthography, and etymology of the word, which he ſaith is *arraamare* or *adrhamire*, for it is nothing ſo. 2. Of what importance, and how eſſential it is, that in capital offenſes the offender being in court ſhould be arrainged or put to anſwer; the want whereof rendered the judgment given againſt the *Mortimers* erroneous, and reverſed by the king and his parliament.

The arraignment of a priſoner, therefore, conſiſts of theſe parts:

1. The calling the priſoner to the bar by his name, commanding him to hold up his hand, which tho it may ſeem a trifling circumſtance, yet it is of importance, for by holding up his hand *conſtat de perſonâ indictati* and he owns himſelf to be of that name *(a)*.

2. Reading the indictment diſtinctly to him in *Engliſh*, that he may underſtand his charge.

3. Demanding of him whether he be guilty or not guilty; and if he pleads *not guilty*, the clerk joins iſſue with him *cul. priſt*, and enters the priſoner's plea; then he demands how he will be tried, the common anſwer is, *by God and the country*, and thereupon the clerk enters *po. ſe*, and prays to God to ſend him a good deliverance.

But if the priſoner hath any matter to plead either in abatement, or in bar of the indictment, as *miſnomer*, *auterfoits acquit*, *auterfoits convict*, a pardon, *&c.* then he pleads it without immediate anſwering to the felony: but in ſome caſes *ſi trove ne ſoit*, then to the felony *not guilty*, *de quo poſtea*. And thus far what the arraignment is.

II. How to be done or performed.

On the part of the court, what is to be done is ſhewn before, but in relation to the priſoner and his coming to the bar.

The priſoner, tho under an indictment of the higheſt crime, muſt be brought to the bar without irons, and all manner of ſhackles or bonds. *Stamf. P. C. fol.* 78. *a.* 2 *Co. Inſt.* 316. *Co. P. C. p.* 34, 35. *Bract. Lib.* III. *fol.* 137. *a. & alios libros ibi*, unleſs there be a danger of eſcape, and then they may be brought with irons.

But *note*, at this day they uſually come with their ſhackles upon their legs, for fear of an eſcape, but ſtand at the bar unbound, till they receive judgment *(b)*.

[220] III. When the party is to be arraigned.

In caſe of murder at the common law, the judges did uſually forbear to arraign the priſoner upon an indictment till the year and day were paſt, whether an appeal were depending or not *per omnes juſtic'* Angliæ, 22 *E.* 4. *Coron.* 44. unleſs the evidence were very clear

(*a*) The ceremony of holding up the hand is not required in the caſe of a peer, nor is it of abſolute neceſſity in the caſe of a common perſon, it being ſufficient that it appears to the court who is the perſon indicted. See lord *Delamere's* caſe, *State Tr. Vol.* IV. *p.* 211. and lord *Mohun's* caſe, *State Tr. Vol.* IV. *p.* 508.

(*b*) By this it appears to have been our author's opinion, that upon whatever occaſion a priſoner be brought into court, he ought not to ſtand there *in vinculis* till after his conviction, when he comes to receive judgment, nor even at the time of his arraignment, (for that is the time our author is here diſcourſing of), yet in *Layer's* caſe, *Mich.* 9 *Geo.* 1. *B. R.* a difference was taken between the time of arraignment, and the time of trial; and accordingly the priſoner in that caſe ſtood at the bar in chains during his arraignment. See *State Tr. Vol.* VI. *p.* 230, 231.

to

to convict him, and no appeal depending: or altho an appeal were depending, if the appellant were an infant. 21 *E.* 3. 23. *b. Stamf. P. C fol.* 107. *a.* becauſe of the delay.

But now by the ſtatute of 3 *H.* 7. *cap.* 1. the juſtices ſhall proceed to try him upon an indictment of murder (or manſlaughter) tho within the year, and if acquitted, yet he ſhall not be diſcharged, but at the diſcretion of the juſtices ſhall be continued in cuſtody, or upon bail, till the year and day be paſt.

So that by this ſtatute *auterfoits acquit* of principal or acceſſary, or *auterfoits attaint* of the principal upon an indictment is no bar to an appeal, but *auterfoits acquit* upon an appeal remains a bar to an indictment for the ſame offence.

But *auterfoits convict* upon an indictment, and having had his clergy, is a good bar to an appeal notwithſtanding this ſtatute, *de quo infra*; and yet in favour of an appeal, if a man be indicted of murder, and plead to it, and be convict, if the wife enter an appeal for the ſame death againſt the priſoner, as long as that appeal is depending, judgment ſhall be reſpited; but if the wife be nonſuit in her appeal, then judgment ſhall be given upon the conviction. *Vide M.* 12 & 13 *Eliz. B. R. Dy.* 296. *a. Stanley*'s caſe.

But as to other indictments, as of robbery, &c. the ſame remain at common law, as before this ſtatute, yet it is the conſtant courſe, unleſs an appeal be depending, to arraign the priſoner upon an indictment within the year; for now by the ſtatute of 21 *H.* 8. *cap.* 11. the party robbed hath as effectual reſtitution of his goods upon his proſecution of an indictment, as upon an appeal; and ſo an appeal of [221] robbery is rarely brought.

Nay, tho an appeal of robbery be brought by writ, the juſtices will not ſtay the arraignment of the priſoner upon the indictment, unleſs it be by bill, or that the plaintiff in an appeal by writ hath declared upon the writ, becauſe the writ is general, and it cannot appear what the goods are till declaration; but in an appeal of death by writ the perſon killed is certain, 31 *H.* 6. 11. *a. Stamf. P. C. Lib.* II. *cap.* 36. *fol.* 107. *a.*

If a man be indicted and appealed before the ſame juſtices for the ſame murder or other felony, the party ſhall be arraigned upon the appeal firſt, and not upon the indictment, in favour of the appellant, as I have ſaid; but if the appellant be nonſuit upon his appeal, the priſoner

ſoner ſhall be arraigned upon the appeal *(c)*, and proceſs ſhall ceaſe upon the indictment. 4 *E.* 4. 10. *a.* And it ſhall be entered *ceſſet proceſſus* upon the indictment, 4 *E.* 4. 10. *a.* And if the priſoner plead, and be acquitted, or plead the king's pardon, and it be allowed, regularly the acquittal or pardon, and the allowance thereof ſhall be entered upon the appeal, tho it be ſafe to enter it likewiſe upon the indictment; and therefore if in that caſe, thro the miſtake of the clerk, there be no entry of *ceſſet proceſſus* upon the indictment, and the indictment lying thus open, there be proceſs of outlawry made upon the indictment, and the party be outlawed, he hath no remedy but to bring a writ of error upon the outlawry, and he may aſſign for error his acquittal upon the appeal, and aver it to be the ſame felony, and upon confeſſion of the king's attorney, it ſhall be reverſt. 4 *E.* 4. 10. *a.*

If there be an inquiſition before the coroner of murder, and returned, and likewiſe an indictment for the ſame offenſe by the grand inqueſt, it is uſual to arraign the priſoner upon the indictment, but he may be arraigned upon both at the ſame time; but if arraigned upon the indictment only, there ought to be an entry of *ceſſet proceſſus* upon the coroner's inqueſt as to the priſoner, who may otherwiſe be outlawd upon it.

[222] If a priſoner be found guilty of murder by the coroner's inqueſt, and a bill of indictment of murder be againſt him at the ſeſſions of gaol-delivery for the ſame murder, it is uſual to arraign him upon the coroner's inqueſt, and not upon the indictment, and if he be acquit upon that, then to arraign him upon the bill, and put him to his plea of *auterfoits acquit.*

But to avoid the trouble of a double arraignment and plea, I have obſerved this courſe.

1. If one indictment be of manſlaughter, and the other of murder, then to arraign him of that offenſe, which is higheſt, and ſpare the other.

2. If both be of murder, but one is inſufficient, as for the moſt part coroners inqueſts are, then to arraign him upon the good indictment, and quaſh the other.

3. If both preſentment and indictment be of the ſame nature, and both (for inſtance), of murder, and both good, and both returned into court the ſame ſeſſions, I have uſually arraigned the priſoner upon both (ſo as they be put upon the ſame inqueſt to be tried), to avoid

(c) At the ſuit of the king.

the

the trouble of the plea of *auterfoits acquit* or *attaint*, and to indorſe his acquittal or attainder upon both preſentments, always directing the jury to acquit him upon both, if acquitted upon one, and *e converſo*.

Now concerning the arraignment of the acceſſary; regularly the acceſſary ſhall not be arraigned, nor put to anſwer till the principal be attaint by outlawry or confeſſion, or be convict, and attaint alſo by judgment upon verdict; for it is an offenſe dependant upon the principal; and altho the principal be convict, yet if he have his clergy, the acceſſary is diſcharged thereby, and ſhall not be arraigned. 2 *Co. Inſt.* 183. *ſuper ſtat. Weſtm'* 1. *cap.* 14.

But yet the principal and acceſſary being indicted by one or ſeveral indictments, and both appearing, may be arraigned together at the ſame time *(d)*, and both pleading not guilty, the ſame jury [223] ſhall be charged with both, and directed to inquire of both, *viz.* firſt of the principal, and if they find him guilty, then to enquire of the acceſſary 9 *Co. Rep.* 119. *a.* lord *Sanchar's* caſe. 2 *Co. Inſt.* 184. *ſuper ſtat. Weſtm'* 1. *cap.* 14.

But if *A.* and *B.* be indicted for murder, *A.* as giving the ſtroke, and *B.* as being preſent, aiding, and abetting, if *A.* flies, and *B.* is apprehended, *B.* may be arraigned and tried before *A.* be attainted by outlawry, tho he be principal but in the ſecond degree, for they are both principals; and ſo it was done in the caſe of *Thady*, *H.* 25 & 26 *Car.* 2. tho in point of diſcretion it is good to try them both together.

If *A.* be indicted of high treaſon, and *B.* be indicted for receiving or comforting him, or procuring, or abetting (but not preſent), here it is true they are all principals; but in as much as *B.* in caſe of a felony would have been but acceſſary, and it is poſſible that *A.* may be acquitted of the fact, it ſeems to me, that *B.* ſhall not be put to anſwer of the receipt or procurement till *A.* be outlawd, or at leaſt jointly with *A.* *(e)*, and in this caſe the ſame jury may be charged with both, and their charge ſhall be firſt to inquire whether *A.* were guilty, and if not, then to acquit both *A.* and *B.* and if *A.* be found guilty, then that they inquire of *B.* And in *Somervill's* caſe, 26 *Eliz.* *(f)*, mentiond before, the inquiry was firſt of the principal offender, and then of the receiver or procurer to avoid that inconveni-

(d) They *may be*, but not *neceſſarily muſt*, as was laid down for law by C. J. *Pemberton* in the trial of Count *Coningſmark*. See *State Tr. Vol.* III. *p.* 465. and Sir *John Hawle's* remarks thereon, *State Tr. Vol.* IV. *p.* 199.

(e) Yet in lady *Liſle's* caſe, *State Tr. Vol.* IV. *p.* 105. it was without any foundation in law practiſed quite contrary. *Vide ſupra*, *Part.* I. *p.* 238. *in notis.*

(f) 1 *And* 109.

ence

ence and *awerouſt*, that might happen in caſe *B.* were firſt convict of the procurement and receipt, and yet poſſibly *A.* might be acquitted of the principal fact.

If the principal do not plead *not guilty*, but ſome other plea, as in abatement, or in bar, the acceſſary ſhall not be put to plead till the plea of the principal be determind. 9 *H.* 7. 19. *b.* but if the principal plead *not guilty*, then the acceſſary, if preſent, ſhall be put to plead preſently, and they may be tried by the ſame inqueſt, *ut ſupra.*

[224] In antient time, if the principal made default, and appeard not, the acceſſary was not put to anſwer. 44 *E.* 3. 7. *b.* *Coron.* 216. But of later times the acceſſary, if he appear, hath been arraigned and put to plead, but proceſs againſt the inqueſt, and trial ceaſeth till the principal come in or be attaint by outlawry. 9 *H.* 4. 2. *a.* 7 *H.* 4. 36. *a.* *Stamf. P. C. Lib.* I *cap.* 49. *fol.* 46. *a.*

But the acceſſary may pray proceſs againſt the principal, *& renuntiari juri pro ſe introducto*, and his conſent makes it not error, 8 *H.* 5. 6. *b.* *Coron.* 463. and therefore, if the acceſſary be acquitted before the principal tried, it is agreed, that it is a good acquittal, and by the ſame reaſon, if he were convict, it is a good conviction, yet no judgment ſhall be given againſt him upon that conviction till the principal tried.

And upon this reaſon it is, that if *A.* be arreſted or in priſon for felony, and *B.* reſcue him, or the gaoler ſuffers him voluntarily to eſcape, tho this be a diſtinct felony in *B.* the reſcuer, and in the gaoler that voluntarily ſuffers him to eſcape, for which they may be preſently indicted, yet they ſhall not be arraigned or put to anſwer till *A.* be convicted and attainted by judgment, or outlawd. 1 *H.* 7. 6. *a.* 1 *E.* 3. 16. *b.* 2 *Co. Inſtit.* 592. *ſuper ſtat. de frangentibus priſonam*; for if *A.* be acquitted upon the indictment, the reſcuer or gaoler ſhall be diſcharged.

But if *A.* be indicted of the felony, or not indicted, and be lawfully impriſond and break the priſon, he may be indicted and arraigned for his felony in breaking the priſon, before his conviction of the felony for which he was committed. 2 *Co. Inſtit. ubi ſupra.*

And yet, if after that indictment *A.* be arraigned of the principal felony, and acquitted, he may plead that acquittal of the principal felony in bar to the indictment for the breach of priſon; *vide rationem ſupra, Part* I. *cap.* 54. *p.* 611.

If

If a *capias* be awarded againſt a felon, and he render himſelf and plead not guilty, and is let to bail, and then makes default, a *capias ad audiendam juratam* ſhall iſſue; and if he be brought in, he ſhall be brought in upon his plea, but it is ſaid by *Scot*, that if he had rendred himſelf upon the *exigent*, and pleaded not guilty, and been let to bail till the trial, and then made default, [225] whereupon an *exigent* is awarded, and the felon is brought in upon the *exigent*, he ſhall plead *de novo*, and conſequently be arraigned *de novo*, for by the *exigent* awarded, the firſt iſſue is diſcontinued. 16 *Aſſiz.* 13.

See 4 Black. Com. ch. 25. Of arraignment and its incidents, Burn. Tit. Arraignment and Index to 2 Hawk. P. C. tit. Arraignment.

CHAP. XXIX.

Concerning the plea of the priſoner *upon his arraignment, and firſt* of his confeſſion *of the fact charged*, and approving *others*.

WHEN the priſoner is arraigned, and demanded what he ſaith to the indictment, either he confeſſeth the indictment, or pleads to it, or ſtands mute, and will not anſwer.

The confeſſion is either ſimple, or relative in order to the attainment of ſome other advantage.

That which I call a ſimple confeſſion is, where the defendant upon hearing of his indictment without any other reſpect confeſſeth it, this is a conviction; but it is uſual for the court, eſpecially if it be out of clergy, to adviſe the party to plead and put himſelf upon his trial, and not preſently to record his confeſſion, but to admit him to plead. 27 *Aſſiz.* 40.

If it be but an extrajudicial confeſſion, tho it be in court, as where the priſoner freely tells the fact, and demands the opinion of the court, whether it be felony, tho upon the fact thus ſhewn it appear to be felony, the court will not record his confeſſion, but admit him to plead to the felony *not guilty*. 22 *Aſſiz.* 71. *Stamf. P. C. Lib.* II. *cap.* 51. *fol.* 142. *b.* [226]

A con-

A confeſſion in order to ſome other advantage, is either where the priſoner confeſſeth the felony in order to his clergy, *de quo infra, cap.* 44. or where he confeſſeth the offenſe, and appealeth others thereof, thereby to become an approver, and thereupon to obtain his pardon, if he convict them, and this lets in the whole learning touching approvers and approvement, which I ſhall here open in the order that Mr. *Stamford* hath gone before me.

1. Of what offenſes a man may be an approver. 2. In what ſuits. 3. At what time. 4. Before whom. 5. In what manner. 6. How he ſhall be orderd before and after his appeal. 7. What proceſs ſhall iſſue againſt the party appeald. 8. What pleas he ſhall have, and how tried. 9. How proceeded in. 10. What judgment ſhall be given for or againſt the appellor or appellee.

Before I come to theſe particulars, we are to know, that it is purely in the diſcretion of the court to admit the approver to appeal or not, or to give him any reſpite from judgment or execution upon his confeſſion and approvement; for otherwiſe it would be in the power of any party arraigned for felony by becoming an approver to delay judgment, where (it may be) his appeal is but feigned, for the admiſſion of his appeal or reſpite of judgment is but a matter of grace and diſcretion. 21 *H.* 6. 34. *b. Coron.* 66 & 67. *per omnes juſtic' utriuſque banci. Co. P. C. cap.* 56. *p.* 129.

And therefore this courſe of admitting of approvers hath been long diſuſed, and the truth is, that more miſchief hath come to good men by theſe kind of approvements by falſe accuſations of deſperate villains, than benefit to the public by the diſcovery and convicting of real offenders, gaolers for their own profits often conſtraining priſoners to appeal honeſt men, and therefore proviſion made againſt it by 1 *E.* 3. *cap.* 7.

And upon this reaſon it is, that as of later times the admiſſion of ſuch appeals hath been wholly diſuſed, ſo in times when they were admitted, a great ſtrictneſs was held upon ſuch appeals, as [227] will appear upon the examination of the enſuing particulars.

I. Therefore touching the offenſes, whereof an approvement may be.

It may be only of capital offenſes, as of treaſon or felony, whether they be at common law, or by act of parliament.

When a priſoner is admitted to be an approver, he is ſworn in court to approve, or rather to diſcover all felonies and treaſons that he knows,

knows, and a certain time prefixt (as three or four days), to make his appeal, and a coroner aſſigned to him to receive ſuch his appeal and diſcovery. 12 *E.* 4. 10. *b.*

And yet the appeal is not good as an appeal, or as an approvement to compel the parties appealed to anſwer, but only as to ſuch felonies or treaſons that were committed by the appellee together with the appellor, and whereof the appellor ſtands indicted in court, and as to other treaſons or felonies, [than] whereof the appellor ſo ſtands indicted, it is no legal appeal or approvement to put the appellee to anſwer.

And therefore if *A.* being indicted for robbing of *B.* and he appeal *C.* that he robbed *A.* himſelf, this is a void appeal, and the appellor ſhall be executed, and the appellee ſhall not be put to anſwer to it. 25 *E.* 3. 39. *(a)*.

So if he appeal *C.* as acceſſary to the robbery of *B.* either before or after, *C.* ſhall not be put to anſwer, for it is not the ſame felony charged upon *A.* but only an acceſſary to it. 10 *E.* 4. 14. *a.*

So if *A.* be indicted of felony, and he appeal *B.* of treaſon, *B.* ſhall not be put to anſwer that appeal; but *B.* being ſo accuſed, it may be a ground for the juſtices in point of diſcretion to make *B.* find ſureties for his appearance at the next ſeſſions, or in the king's bench, and in the mean time to be of good behaviour towards the king and his people, as was done when a perſon that had abjured for felony, made ſuch an appeal of treaſon. *M.* 19 *E.* 2. *Coron.* 387. *vide ſimile* 21 *E.* 3. 18. *a. Coron.* 449.

II. In what ſuits.

Approvement lies not in an appeal of felony, for the de- [228]
lay that may come thereby to the plaintiff. *M.* 15 *E.* 3. *Coron.* 113. 2 *R.* 3. 22. *b.* And therefore, if a party be indicted of felony, and the priſoner becomes an approver, if an appeal for the ſame felony be ſued afterwards, all proceedings upon the approvement ſhall ſtay. 8 *H.* 5. *Coron.* 442.

But if *A.* be indicted of felony, and he becomes an approver, and appeal *B.* as a companion with him in the ſame felony, and *B.* comes in, it ſeems he may not become an approver, and appeal *C.* of the ſame felony, 15 *E.* 3. *Coron.* 113. *Stamf. P. C. Lib.* II. *cap.* 58. *fol.* 147. *a.* tho 11 *H.* 4. 93. *b. B. Coron.* 34. ſeems to be contrary.

(a) *N. Edit.* of the year books, *fol.* 82. *b.*

If

If a man be arreſted and impriſond for ſuſpicion of felony, he cannot become an approver, becauſe he is not indicted. *Stamf. P. C. Lib.* II. *cap.* 55. *Co. P. C. cap.* 56. *p.* 129. againſt the opinion of *Strange* and *Hankf.* 6 *H.* 6. *Coron.* 231.

III. At what time a man ſhall become an approver.

After a perſon is abjured for felony, 19 *E.* 2. *Coron.* 387. 19 *E.* 3. *Ibid.* 443. or be outlawd, 21 *E.* 3. 17. *b. Coron.* 452. or otherwiſe attaint, and hath his clergy, 17 *E.* 3. *Coron.* 445. he ſhall not be admitted to be an approver; nor one convict by verdict. 19 *H.* 6. 47. *b. Coron.* 8.

If *A.* be indicted of felony, and plead *not guilty*, and put himſelf upon the country, and the jury is charged with him, yet before the evidence fully heard, and the jury gone from the bar, he may be admitted to be an approver. 12 *E.* 4. 10. *b.* 11 *H.* 7. 5. *b. per omnes juſtic': vide contra* 2 *H.* 7. 3. *a. (b)*, 9 *H.* 5. *Coron.* 440.

But if the whole evidence be heard, then he ſhall not be admitted to be an approver, 21 *E.* 3. 18. *Coron.* 449. 2 *H.* 7. 3. ſo that it ſeems much in the diſcretion of the court to admit him to be an approver
[229] at any time before verdict given, tho after *not guilty* pleaded. 12 *E.* 4. 10. *b. in B. R.* & 11 *H.* 7. 5. *b. per omnes juſtic'*, which is of greater weight than the other books.

IV. Before whom a man may become an approver.

It may be before the juſtices of the king's bench, or juſtices of gaol-delivery, or juſtices in *eyre*, for they may aſſign a coroner to the priſoner to receive his appeal.

But it cannot be in inferior courts, as thoſe that have *ſoke* and *ſake*, and *infangtheft*, and *utfangtheft*. *Bract. Lib.* III. *cap.* 35.

But in caſe of a royal franchiſe, as a county palatine, or the royal franchiſe of *Ely*, where the biſhop hath juſtices and coroners of his own making, there a felon may become an approver. 29 *E.* 3. 42. *a. Coron.* 462. in the caſe of *Ely*.

Neither can a man become an approver before juſtices of peace, nor *oyer* and *terminer*, for they cannot aſſign a coroner. 9 *H.* 4. 1. *Coron.* 457. 4 *Co. Inſtit.* 165. 169. *Co. P. C.* 130.

V. The manner of approver, and of the allowance of it.

(b) In this caſe the whole evidence had been given, and the jury gone from the bar, which was one reaſon aſſigned by the court, why they could not admit the priſoners to become approvers; ſo that this caſe no way contradicts what is before ſaid; but there was another exception beſides, on which the court laid the greateſt ſtreſs, becauſe they only prayed a coroner, but did not acknowledge the felony.

Before

Before any man ſhall be admitted to be an approver, he muſt confeſs the indictment in open court, and pray a coroner to be aſſigned him, and regularly this is to be done upon his arraignment, before plea pleaded, tho, as hath been ſaid, his confeſſion hath been ſometimes admitted after *not guilty* pleaded. 11 *H.* 7. 5. *b.* 12 *E.* 4. 10. *b.* and therefore if he hath pleaded before *not guilty*, and then prays a coroner without confeſſing the felony, the inqueſt ſhall be taken, and if found guilty he ſhall be executed. 2 *H.* 7. 3. *a.* adjudged; and if he hath not pleaded to the country, but prays a coroner, and will ſay no more, he ſhall have *peine fort & dure*, tho the book of 1 *H.* 5. *Coron.* 441. be that he ſhall be hanged.

Upon confeſſing the felony, and praying a coroner to be aſſigned, the court doth theſe things.

1. They aſſign him a coroner to take his appeal. 2. They prefix him a time to make his appeal, ſometimes three, ſometimes four days. 8 *H.* 5. *Coron.* 439. 12 *E.* 4. 10. *b.* 26 *Aſſiz.* 19. 3. He ſhall be removed out of the ſtrait cuſtody, and make his appeal before the coroner, that he may not have any juſt pretence to ſay it was by dureſs or conſtraint, 12 *E.* 3. *Coron.* 169. and therefore, [230] if upon the coming back of the approver to the court, he wave his appeal, as being made by dureſs and againſt his will, the coroner ſhall be examined touching it upon oath; and if he affirm it was made *de bon grèe*, the appeal ſhall ſtand, but the approver ſhall be hanged. 22 *E.* 3. *Coron.* 255. 12 *E.* 3. *Coron.* 169. 4. The coroner muſt put his appeal into form, and when the priſoner comes back into the court, he muſt repeat his appeal, and ſhall not be helped by the court or any by-ſtander, 26 *Aſſiz.* 19. and if he miſs in repeating his appeal in any matter of moment, as the colour of the horſe, *&c.* he ſhall be hanged; for if he miſtake in ſuch circumſtances, which muſt need come from his own memory and information, it is a ſign it is feigned. 5. If he make not his appeal before the coroner in the time prefixt, he ſhall be hanged; and if he make it, and diſavow it when he comes into the court, he ſhall, upon the examination of the coroner upon oath, be hanged. 6. If he appeal one, who by his own confeſſion is not in the kingdom, he ſhall be hanged. 2 *E.* 3. *Coron* 153. for he cannot be attaint at his ſuit. 7. After his appeal made he ſhall have an allowance of 1 *d. per diem* by the book of 12 *E.* 4. 10. *b.* 26 *Aſſiz.* 19. 8 *H.* 5. *Coron.* 439. three half-pence

per

per diem per Britton, and by *Fortescue* 21 *H.* 6. 34. *b.* nothing at all, till he hath convicted the appellee.

VI. Touching process upon an appeal by an approver.

It is to be known, that altho a coroner cannot receive an original appeal but of such felonies as are committed in that county whereof he is coroner, yet if a felon become an approver, the coroner may take an appeal of any felony, tho committed in a foreign county. 9 *H.* 5. *Coron.* 437.

Altho it seems, that book is not law, for he can appeal only in the county where he is indicted, and he cannot be indicted in one county of a felony committed in another county, therefore *quære librum*; it seems it must be intended where *A.* is indicted in the county of *B.* and taken in the county of *C.* and there the coroner receives his confession and appeal, which possibly he may do without any special assignment *virtute officii*, as he may take an abjuration of a prisoner in a foreign county.

[231]

But the coroner in that case cannot make process against the appellee in a foreign county, 29 *E.* 3. 42. *a. Coron.* 462. but he may in the same county, *Stamf. P. C.* 146. *a. b.*

And therefore the bishop of *Ely* having the royal franchise of *Ely*, and justices and coroners of his own, and also having franchise of *retorna brevium* in divers hundreds in the county of *Suffolk*, and likewise a gaol there, a felon indicted and in prison at *Ely* became an approver before the coroner of the franchise of *Ely*, and appeald one in the bishop's gaol in his hundred in the county of *Suffolk*, the coroner of *Ely* cannot make process to the bishop's bailiff of his liberty in the county of *Suffolk* to bring the appellee to *Ely*, which is in another county, *viz. Cambridgeshire*, ajudged 29 *E.* 3. 42. *a. Coron.* 462.

At common law it seems, if an approver appeal parties that are demurrant in a foreign county, there could be no process made but in the king's bench, by removing the record thither by the justices of gaol-delivery, before whom the parties became an approver.

But this is remedied by the statute of 28 *E.* 1. *de appellatis*, whereby power is given to justices of gaol-delivery to issue process to the sheriffs of foreign counties to take the appellees, and bring them before the justices in that county where the appellor is indicted.

If the appellor allege the place, whereof the appellees are, (as he must), and thereupon process issues to the sheriff of that county, and he return there are no such persons in his bailiwick, 25 *E.* 3. 42. *b.*

or

or *non ſunt inventi*; 21 *H.* 6. 34. *b.* the approver ſhall have judgment and be executed, and he ſhall not be received to ſay they are in another county, and pray proceſs thither. 22 *E.* 3. *Coron.* 460. for if he be once found falſe in what he ſaith, he ſhall not be credited in any thing, but his appeal ſhall be preſumed untrue: *vide* 21 *H.* 6. 34. *b. Coron.* 456.

If the approver die before his appeal determind, or be executed for the felony, 21 *E.* 3. 18. *a.* 21 *E.* 3. 17. *b. Coron.* 452. or hath the advantage of his clergy, 3 *E.* 3. *Coron.* 369. or diſavows his appeal, and will not proſecute it, 21 *H.* 6. 34. *b.* 3 *H.* 6. 50. *b.* yet proceſs ſhall be continued againſt the appellee at the king's ſuit, and the appellee, if he come in, ſhall be arraigned, for the appeal was well commenced, and it ſtands as an indictment, by reaſon of the great preſumption that a man that confeſſeth himſelf guilty, would not charge another falſly to be companion with him in the ſame felony. [232]

But if the appeal were never well commenced, as if the appellor were convicted by verdict or outlawry, *de quibus infra*, or if the king pardons the approver after the approvement made, and before trial, 47 *E.* 3. 16. *a. Stamf. P. C. fol.* 149. *a.* the appellee ſhall be diſcharged without arraignment at the king's ſuit, or further proceſs upon the appeal; for now the approver having his pardon is ſure to eſcape, and therefore ſhall not be truſted in his proſecution againſt another for the ſame felony. But of theſe matters farther under the next head.

If the appellee be returned *non inventus*, the appellor, as hath been ſaid, may be executed, but proceſs of outlawry ſhall iſſue againſt the appellee, as it ſeems not by one *capias* and *exigent*, but by *capias*, *alias*, *pluries* and *exigent*; *quære*.

VII. Touching proceedings upon the appeal after appearance of the appellee.

He that is appeald ſhall not be let to bail but in three caſes: 1. If the approver be dead. 2. If the perſon appeald be of good fame. 3. If the appellor wave his appeal. *Weſtm.* 1. *cap.* 15. *(a). Stamf. P. C. Lib.* II. *cap.* 18. *Fol.* 74. *a. b.*

And therefore, if *A.* be ſeverally appeald by two approvers, *B.* and *C.* indicted ſeverally of ſeveral felonies, and *A.* join battle, and van-

(a) 2 *Co. Inſtit. p.* 188.

quiſh *B.* yet he ſhall not be let to bail till the appeal of *C.* be determind. 25 *E.* 3. 42. *b.*

[233] When the appellee comes *in* he may take his legal exceptions to the inſufficiency of the appeal, as that the appellor is not in priſon but at large, 21 *E.* 3. 18. *a. Coron.* 448. 6 *H.* 6. *Coron.* 231. or that the appellor is within age, or above ſeventy years old, or a woman, or maimed, whereby the appellee loſeth his trial by battle. *Stamf. P. C. cap.* 58. *fol.* 147. *b.* or that he is a clerk convict, and hath not made his purgation. 17 *E.* 3. 17. *a.* or that he is abjured the realm. 19 *E.* 2. *Coron.* 387. or that he was convict by verdict before he appealed of the ſame offenſe: *Vide Co. P. C. cap.* 56.

Alſo he may have all thoſe exceptions, which an appellee at the ſuit of a lawful perſon either by writ or bill may have, as that the plaintiff is outlawd for another felony, or in a perſonal action, but if he hath obtained his pardon, the appellee ſhall be put to anſwer, as in another appeal. 21 *E.* 3. 17. *b.* but if the approver be pardoned *that* felony, upon which he makes his appeal, the appellee ſhall not be put to anſwer neither at the party's ſuit, nor at the ſuit of the king. 47 *E.* 3. 16. *a. ubi ſupra.*

If the appellee hath no exceptions to the appeal, or to the diſability of the appellor, but pleads to the felony, he may put himſelf upon trial, either by battle, or by the country.

Touching the form of the trial by battle, I ſhall make no long narrative at this time, becauſe it is an unuſual trial at this day, and beſides, it will come more aptly in another place.

If when battle is joined they come to the combat, and the appellee be vanquiſhed, it is an attainder of the appellee, and the appellor ſhall have the benefit of the king's grace and a pardon *tanquam ex merito juſtitiæ.*

But if the approver appeals ſeveral perſons, and they ſeverally join battle, the appellor ſhall not have his pardon till he vanquiſh them all ſucceſſively, for if he be vanquiſhed by the laſt, or diſavow his appeal againſt the laſt, he ſhall be executed. 41 *E.* 3. *Coron.* 98. 21 *H.* 6. 34. *b. Coron.* 456.

And *note*, that, if in the field when they come to battle, the appellor diſavow his appeal, the approver ſhall be executed, and the appellee deliverd without being arraigned at the king's ſuit, for his diſ-

diſavowing in the field is *quaſi* a trial in fact. 21 *H.* 6. 34. *b. Coron.* 456. *Stamf. P. C.* 148. *a. b.*

But if before the deraigning of battle the approver diſavow his appeal, the approver ſhall be hanged, but the appellee ſhall be put to anſwer at the king's ſuit, for it may be the king hath other evidence beſides the approver to convict him.

If *A.* becomes approver, and appeals *B. C.* and *D.* of the ſame felony, and in his combat with *B.* becomes recreant, *B.* ſhall be diſcharged, but the appeal ſhall ſtand againſt *C.* and *D.* 41 *E.* 3. *Coron.* 98.

If three be indicted for the ſame felony, and they become approvers, and the appellee joins battle with them all, he ſhall perform it ſeverally; but if he vanquiſh one of the appellants, he is thereby acquitted againſt all the reſt, and the approvers ſhall be executed, and the appellee deliverd. 7 *E.* 3. 12. *a.*

But if the appeal be of ſeveral felonies, tho he vanquiſh one appellant, he muſt fight ſucceſſively with the reſt. 19 *H.* 6. 35. *a.* 47 *E.* 3. 5. *a.* for the charges are ſeveral by the ſeveral appellants.

If the appellee puts himſelf upon trial *per patriam*, the approver ſhall be ſworn as well to the petit jury upon the trial when he gives his evidence, as well as make a general oath at the time of his firſt becoming approver, and hence he is called *probator, (quod tamen quære,* becauſe he is a perſon convict,) ſo that altho he were a partner in the offenſe, and tho he ſtand indicted of it, and tho he be convicted by his confeſſion, yet he is admitted a witneſs upon his own accuſation or appeal, and the reaſon is, becauſe he accuſeth himſelf by his confeſſion, as well as he doth the appellee by his appeal, and therefore gains a probable credibility of his teſtimony.

And therefore *P.* 19 *Jac.* in the ſtar-chamber, *Noye's Rep. p.* 154. in Sir *Percy Creſby's* caſe, one defendant, that accuſeth not himſelf, is not admitted as a witneſs to convict his companion, but if he accuſe himſelf, he is a witneſs againſt his companion.

But this teſtimony or evidence is not concluſive to the jury, for the jury may conſider as well the credibility or not credibility of the witneſs, as the matter he ſwears. [235]

And altho it ſeems it is now no plea for the appellee to ſay, he is *boni nominis & famæ, & in franco plegio & in aſſiſâ domini regis, & habet dominum, qui ipſum advocet,* as it was in *Bracton's* time, it is

good evidence for the the priſoner, if there be no other evidence againſt him but the teſtimony of the approver; and therefore, if the appellor die, yet the king may proceed with the appeal, becauſe tho he cannot have the teſtimony of the approver himſelf, yet there may be other evidence of the fact.

But yet, when the approver is dead after his appeal, and before trial, the party is bailable, becauſe much of the evidence, which may conduce to the conviction, namely the oath of the approver, is loſt, and ſo leſs probability of his conviction.

If the approver be vanquiſhed and kild upon the place in the battle, or if the appellee be acquitted by verdict, yet a judgment muſt be entred upon his confeſſion; for his bare confeſſion of the felony is a conviction, it is true, but not an attainder till judgment given, *quòd ſuſpendatur per collum*, which is not preſently entred upon his becoming approver, but when either by trial, or for any other cauſe before ſhewn, the court thinks not fit to ſpare his execution.

And on the other ſide, if the appellee be convict by verdict or battle, or ſlain upon the field, yet judgment muſt be given, *quòd ſuſpendatur per collum.* 8 *E.* 3. *Judgement* 225. And in that caſe, altho the life of the approver is ſaved, yet he ſhall be baniſhed, unleſs he obtain the king's pardon. *Stamf. P. C. Lib.* II. *cap.* 52. lord *Coke P. C. cap.* 56. ſaith he ſhall have a pardon *ex debito juſtitiæ*, And thus far concerning approvers.

I ſhould now conſider the buſineſs of abjuration, which is always accompanied with a confeſſion of the felony before the coroner, but becauſe *that* was a kind of appendant to ſanctuary, which is wholly and finally taken away by the ſtatute of 21 *Jac. cap.* 28. I ſhall not incumber myſelf with that buſineſs.

See Index to 2 Hawk P. C. tit. Pleading, Index to 2 Hawk. P. C. tit. Approver. Burn. tit. Approver. 4 Blackſ. Com. ch. 25. p. 329. ch. 27. p. 346. ch. 33. 418. Index to 2 Hawk. P. C. Tit. Battel.

CHAP.

CHAP. XXX.

Concerning the pleas of the priſoner *upon his arraignment, and firſt, concerning* pleas in abatement of the indictment.

THE priſoner upon his arraignment either confeſſeth, or pleads, or ſtands mute; the firſt of theſe is diſpatched in the former chapter, the ſecond matter comes now to be conſidered, *viz.* his pleas upon his arraignment.

Pleas upon the arraignment are of four ſorts.

1. Pleas that are declinatory of his trial, and ſuch were antiently the plea of privilege of ſanctuary, and the plea of clergy; the former is taken away by the ſtatute of 21 *Jac. cap.* 28. the latter ſtands ſtill in force; but becauſe for the moſt part that benefit is claimed after conviction, and rarely before, I ſhall refer the whole buſineſs of clergy to a diſtinct examination, after I have done with the conviction of the priſoner.

2. Pleas in abatement of the indictment.

3. Pleas in bar of the indictment.

4. Pleas to the matter of the indictment, *viz. Not guilty.*

Now as to pleas in abatement of the indictment, they are of theſe kinds.

I. Such defects as ariſe upon the indictment itſelf, and the inſufficiency of it, which hath been at large conſidered in the 24th chapter; if any ſuch exception be taken by the priſoner, he may pray counſel to be aſſigned to him to manage his exceptions and take more; but he ſhall not have a copy of the indictment *(a)* from the court, but he and the counſel aſſigned may have *oyer* of the indictment, and preſs their exceptions upon it.

But it is rare to take any exceptions to indictments before conviction, unleſs upon indictments removed into the king's [237] bench by *certiorari*, which the court may in diſcretion hear or not hear, but remand the priſoner and the indictment.

And the reaſons, why they are not taken in the country before conviction are, 1. Becauſe he may have the ſame advantage of the

(a) But now by 7 *W.* 3. *cap.* 3. in all caſes of treaſon, which works corruption of blood, or of miſpriſion of ſuch treaſon, the priſoner ſhall have a copy of the indictment.

exceptions after the trial and before judgment, as before trial. (*) And 2. Becauſe if the exceptions appear material, the court can quaſh that indictment, and direct a new bill to be ſent out to the grand jury, wherein theſe faults may be amended, and the priſoner arraigned *de novo*.

II. Such defects as are in matters of fact, as *miſnoſmer*, or falſe addition of the priſoner.

As to the plea of *miſnoſmer*: In appeals or actions between party and party, or in indictments, if the defendant plead *miſnoſmer*, he muſt be careful that he conclude not himſelf by the manner of his pleading.

Therefore, when *Alan Gerard* was committed upon a *capias* in felony, the pleading was *& ſtatim ductus ad barram in propriâ perſonâ, & quæſitus quomodo ſe velit inde acquietare ſtatim dicit, quod ipſe habet nomen* Johannis Allen, *& non* Alani Gerard, and pleads over to the felony *not guilty*, and the king's attorney replied, that *tempore indictamenti prædicti fuit & adhuc eſt cognitus tàm per nomen* Alani Gerard, *quàm per nomen* Johannis Allen, *& quód culpabilis eſt de felon' &c. Et hoc petit quod inquiratur per patriam, &c. ideo venit inde jurata, & prædictus* Alanus Gerard *per nomen* Johannis Allen *traditur in ballium: Vide* 6 *H.* 7. 7. *a.*

In an appeal or other action at the ſuit of the party *miſnoſmer* is a good plea.

[238] If the defendant in an appeal or indictment plead *miſnoſmer* of his ſirname, the plaintiff or king may aver, *que conus per un noſme & l'autre.* 1 *H.* 7. 29. *a.*

But in an appeal or action at the ſuit of the party, if *miſnoſmer* be pleaded of the chriſtian name, the plaintiff muſt take iſſue, and cannot plead *conus per l'un noſme & l'autre.* 1 *H.* 7. 29. *a.* 21 *E.* 3. 47. *b.*

In an indictment of felony if the priſoner plead *miſnoſmer* of his chriſtian name, ſome books hold it a good plea. 11 *H.* 4. 41. *b. Miſnoſmer* 18. *Stamf. P. C. Lib.* 3. *cap.* 18. *fol.* 181. *b.* but other books of greater and later authority be to the contrary. 1 *H.* 5. 5. *b.*

(*) But now by 7 *W. cap.* 3. no indictment for high treaſon, whereby any corruption of blood may be made, or for miſpriſion of ſuch treaſon, nor any proceſs or return thereupon ſhall be quaſhed for miſ-writing, miſ-ſpelling, falſe or improper *Latin*, unleſs exception be taken in court before any evidence given upon ſuch indictment, nor ſhall any ſuch miſ-writing, &c. be any cauſe to arreſt judgment after conviction, but ſuch judgment may nevertheleſs be reverſed upon writ of error, as if this act had never been made.

Miſ-

Miſnoſmer 9. *Coron.* 274. 3 *H.* 6. 26. *a.* *(b)*, *B. Miſnoſmer* 6. *per Rolf.*

It ſeems by the caſe of *Gerard* before cited, which was a record of a plea in the time of *E.* 4. tho the defendant may plead *miſnoſmer* of his chriſtian name, yet the king may aver *conus per l'un noſme & l'autre*, tho it be otherwiſe in an appeal, but in all caſes of pleading *miſnoſmer*, he muſt plead over to the felony: *Vide Dy.* 88. *a. b.* 21 *E.* 4. 71. *a. b.*

But, as hath been before ſaid, there is little advantage comes by theſe pleas to the priſoner upon theſe reaſons; 1. Becauſe, if this exception be taken in the country at the gaol-delivery, the court may allow the exception, and direct a new bill according to what the priſoner ſays his true name or addition is, for, as hath been ſaid, whoſoever pleads *miſnomer* or a falſe addition muſt give himſelf the true name and true addition by his plea, and *that* will be concluſive to him.

2. Becauſe this plea of *miſnoſmer* or untrue addition ſhall be always tried by the ſame inqueſt, that is to paſs upon the priſoner, and is ready at the bar, and at common law ſhould never be ſent to be tried in a foreign county. 34 *H.* 6. 50. *a.* 1 *E.* 4. 3. *a.* tho the book of 5 *E.* 4. 2. *a.* as to the addition of place be contrary.

But however in all caſes of indictments of felony, tho the plea in itſelf were a foreign plea, and triable in another [239] county, yet by the ſtatute of 22 *H.* 8. *cap.* 14. (continued by 28 *H.* 8. *cap.* 1. made perpetual by the ſtatute of 32 *H.* 8. *cap.* 3.) all foreign pleas ſhall be tried by a jury of the ſame county where the party is indicted, but *that* ſtatute extends not to treaſon, nor to an appeal of felony, but 32 *H.* 8. *cap.* 2. extends to appeals of felony, but not to an indictment of treaſon, ſo that foreign pleas in caſe of indictments of treaſon ſtand as they did at common law. *Co. P. C. p.* 27.

And *note*, that regularly in all pleas, whether to the writ, or in bar by matter of record, or by matter of fact, or both, if the plea do not confeſs the felony, as the plea of a pardon in caſe of an indictment, or a releaſe in caſe of an appeal, tho his plea be found againſt him by iſſue tried, or adjudged againſt him by the court, yet he ſhall not

(b) The caſe in 1 *H.* 5. 5. *b.* was a miſnomer of the ſirname, and in the abridgement of that caſe, by *Fitzh. Coron.* 274. there is a *quære* added, *quære ſi ſoit en noſme de baptiſme*, and in 3 *H.* 6. 26. *a.* it was not the point of the caſe, but only ſaid *obiter arguendo*; and *Gerard*'s caſe is to the contrary. See alſo *Layer*'s caſe, *State Tr. Fol.* Vol. *p.* 237.

be convicted thereupon, but plead over to the felony *not guilty*, as well upon an indictment, as upon an appeal, and this *in favorem vitæ*, 22. *E.* 4. 39. *per cur'*. 9 *H.* 4. 1. *b.*

III. A third ſort of pleas in abatement by matter *dehors* is matter of record.

If *A.* be indicted of the murder of *B.* and there is another indictment afterwards taken of the ſame death againſt the ſame perſon, and he is arraigned upon the ſecond indictment, becauſe it is the king's ſuit the ſecond ſhall not abate; yet uſually the juſtices quaſh the other by judgment.

Yet *nota* the common courſe to prefer a new indictment of murder to the grand jury, altho an inquiſition of murder be returned by the corener, and if the coroner's inquiſition be inſufficient indeed, it ſhall be quaſhed, but if ſufficient, it is uſual to arraign the priſoner upon both indictments, and an acquittal upon one ſhall be upon both; and this is done, becauſe otherwiſe the coroner's inqueſt will ſtand as a charge on record againſt the priſoner, tho acquitted upon the indictment, and proceſs of outlawry will iſſue thereupon

So it is the conſtant uſe at this day to prefer two indictments upon the ſame killing againſt the ſame perſon, one of murder, and [240] the other of manſlaughter upon the ſtatute of 1 *Jac.* for ſtabbing, and the priſoner arraigned upon both pleads to both, and the jury charged with both, *viz.* that if they find him guilty of both indictments, to return it ſo, if not guilty of murder, yet to inquire whether guilty upon the other indictment.

If a duke, or an earl, or baron be indicted by a common name of *J. S. miles*, or *J. S. armiger*, he may plead the *miſnoſmer* to the indictment, *viz.* that he is a duke, or an earl, or baron, or peer of the realm, *nient noſme, &c.* becauſe that title is part of his name, and intitles him to be tried by his peers; but then he muſt ſhew forth a writ teſtifying it upon his plea pleaded, becauſe it is but dilatory, and ſhall not be tried by the country, but by the record 35 *H.* 6. 46. *a. per Forteſcue.* 6 *Co. Rep.* 53. *a.* counteſs of *Rutland*'s caſe, *Per curiam.*

And thus far touching dilatory pleas.

See Index to 2 Hawk. P. C. Tit. Abatement.

CHAP.

CHAP. XXXI.

Concerning pleas in bar *of an indictment of felony or treaſon, and firſt, of* auterfoits acquit.

PLEAS in bar of the indictment of felony or treaſon are of two kinds, *viz.* 1. Such as are purely matters of record, or 2. Such as are mixt, partly conſiſting of matters of record, partly of matters of fact.

Of the former ſort are the pleas of pardons, either general by act of parliament, or ſpecial by the king's charter.

But becauſe the buſineſs of pardons is not only a large title and full of variety, but is alſo applicable to all offenſes criminal, whether the party be indicted or not indicted, or whether convicted, or attainted, outlawd, or put in *exigent*, I ſhall reſerve the diſcuſſion of pardons towards the end of this book. [241]

Of the latter ſort are many pleas conſiſting of matters of record and alſo matters of fact. And they are of theſe ſorts principally.

1. *Auterfoits acquit* of the ſame felony.
2. *Auterfoits attaint* or *convict* of the ſame felony.
3. *Auterfoits attaint* of another felony.
4. *Auterfoits convict* of another felony and had his clergy.

Now as to the plea of *auterfoits acquit*, (as alſo *auterfoits attaint de meſme felony ou treaſon,)* it conſiſts of two kinds of matters. 1. Matter of record, namely, the former indictment and acquittal, and before what juſtices, and in what manner, *viz.* by verdict or otherwiſe; and 2. Matter of fact, namely, that the priſoner is the ſame perſon that was acquitted, that the fact is the ſame of which he was acquitted, and whereof he is now indicted. This plea, tho the priſoner miniſtreth rudely, yet counſel ſhall be aſſigned to him to put his plea in due form, becauſe it is a ſpecial plea.

Mr. *Stamford* tells us, that the priſoner need not have the record of his acquittal *in poigne*, becauſe the plea is not dilatory, but in bar, (and ſo in the other caſe of *auterfoits attaint*, as it ſeems,) according to the difference taken by *Frowick*. 21 *H.* 7. 9. *a.*

But if that ſhould be law, it were in the power of every priſoner to delay his trial as he pleaſeth, by pleading *auterfoits acquit* or *attaint* in another

another court, and ſo to put the king to reply *nul tiel record*, and then day given over to the next gaol-delivery to have the record, and to remove it by *certiorari* into the king's bench, if the trial be there, or the tenor of it by *certiorari* into chancery, and by *mittimus* into the court where the trial is.

For regularly, if a record be pleaded in bar, or declared upon in the ſame court, the other party ſhall not plead *nul tiel record*, but have [242] *oyer* of the record; but if it be in another court, he ſhall plead *nul tiel record*, and a day given to procure the certificate of the record, or the tenor thereof. 5 *H.* 7. 24. *a. b.*

But it ſeems, that for the avoiding of falſe pleas and ſurmiſes and to bring offenders to ſpeedy trial in capital cauſes the priſoner muſt ſhew the record of his acquittal, or vouch it in the ſame court one of theſe ways.

1. By removing the tenor of the record of his acquittal into chancery by *certiorari*, and having it *in poigne*, or ſent to the juſtices by *mittimus ſub pede ſigilli* and thus the priſoner pleading *auterfoits acquit* ſhewed the record of his acquittal *ſub pede ſigilli* 2 *E.* 3. 26 *b. Coron.* 150.

2. Or elſe if he be arraigned in the king's bench upon an indictment removed, or found before them, and were formerly acquitted of the ſame felony, either before juſtices of peace or gaol-delivery, the court will give him a writ of *certiorari* to remove the record before them, and reſpite his plea till he can remove his acquittal into the court, that ſo he may form his plea upon it, for the record is part of his plea, and thus it was done. 20 *E.* 2. *Coron.* 232. and thereupon his plea is put into form ſetting out the record in certain, *Et hoc vocat recordum acquietanciæ prædictæ coram ipſo rege hic ad mandatum domini regis miſſum & coram ipſo rege remanens*; and thus it is pleaded in 2 *E.* 4. in *Hodſon*'s caſe, who was arraigned in the king's bench for murder, and pleaded an acquittal before the juſtices of peace in *Lincolnſhire*.

But it is to be obſerved, that the record muſt be removed by writ; for altho the king's bench may take an indictment or other record of the juſtices of peace *propriis manibus*, where it is to be proceeded on for the king, yet they cannot take a record of an acquittal to ſerve the priſoner's plea without writ. 8 *E.* 4. 18. *b.* 3 *E.* 3. *B. Coron.* 218.

If a man pleads *auterfoits acquit de meſme felonie*, and vouch the record, the court may examine proof, that it is the ſame felony, and thereupon allow it without any ſolemn confeſſion by the king's attorney, 26 *Aſſiz.* 15. But the ſafeſt way is the confeſſion of the king's attorney,

or

or an inqueſt charged to inquire, whether it be the ſame fact, *Vide R. Entries* 385. *a.* his plea allowed by the teſtimony of the juſtices of peace before whom he was acquit, *ideo conſideratum eſt quòd prædictus B. de feloniâ prædictâ ſit quietus & eat inde ſine die.*

¶ 3. If the priſoner be indicted and arraigned in the country before juſtices of gaol-delivery, *&c.* and the priſoner pleads *auterfoits acquit* of the ſame felony before the ſame juſtices in that county, or other juſtices of the ſame county, that were before them, then he concludes his plea, *Et hoc vocat recordum acquietanciæ, prædictiæ coram præfatis juſticiariis* at ſuch a gaol-delivery; and if it be in the king's bench, he mentions the term and roll, and thus is the plea in 13 *E.* 4. *Clud*'s caſe in the king's bench.

So that the priſoner, tho he doth not ſhew the record *ſub pede ſigilli*, yet he muſt plead it certain, and have the record in court and remove it thither, if it be not in the ſame court, and not expect till *nul tiel record* be pleaded, for it is part of the priſoner's plea, tho the court may favour him with time to procure the removal of the record.

¶ Now the matter of fact of his plea conſiſts in his averment, that he is the ſame perſon. and that the felony, whereof he was acquitted, is the ſame whereof he is indicted, which is iſſuable, and the king's attorney may take iſſue upon it, or confeſs it if it be true, and then thereupon judgment ſhall be entered, *quòd eat ſine die*, or the court may examine proofs and allow it. 26 *Aſſiz.* 15.

¶ But it is to be known, that there muſt not only be an acquittal by verdict, but a judgment thereupon, *quòd eat ſine die*, for the bare verdict of his former acquittal is not a ſufficient bar without a judgment pleaded alſo, tho the acquittal regularly is a warrant for entry of the judgment at any time after.

And *note* alſo, that a formal acquittal by judgment is not only a bar of a new indictment for the ſame offenſe, but if the party be outlawd upon that new indictment, he may aſſign his former acquittal for error in that outlawry, and reverſe it for that cauſe, and in that caſe the judgment is not only for the reverſal of the outlawry, but alſo farther, *quòd ipſe tàm de indictamento de morte & murdro prædict' &c. quàm de utlegariâ prædictâ eat ſine die*, and ſuch is [244] the judgment in *Clud*'s caſe 14 *E.* 4. where *that* error is aſſigned to reverſe the outlawry.

Now for the full declaration of this plea theſe things are conſiderable. 1. What ſhall be ſaid the ſame felony whereof the party was acquitted.

acquitted. 2. What manner of acquittal there muſt be to make it a bar. 3. In what ſuits *auterfoits acquit* is a plea.

I. As to the firſt of theſe.

If *A.* and *B.* be indicted as principals in robbing or killing of *D.* and *B.* be convict as principal, and *A.* be acquitted, if after this *A.* be indicted, as acceſſary after the fact, this formal acquital as principal, is no bar, for it is another offenſe, 27 *Aſſiz.* 10. *Coron.* 200. 8 *H.* 5. 6. *b. Coron.* 463. *Stamf. P. C. fol.* 105. *a.*

But if *A.* be indicted as acceſſary before the fact, he may (as it is held,) plead *auterfoits acquit* as principal, becauſe it is in effect the ſame offenſe. 2 *E.* 3. 26. *b. Coron.* 150. 282. but antiently the law was otherwiſe. 8 *E.* 2. *Coron.* 424. *Itinere Kant'.*

If *A.* be indicted in the county of *B.* for the murder of *C.* and it be ſuppoſed that the murder was committed 1 *Martii* 17 *Car.* and he be acquitted. and after indicted again in the ſame county, ſuppoſing the murder 21 *Car.* yet notwithſtanding that variance he may plead *auterfoits acquit*, and aver it to be the ſame felony, for the day is not material, and beſides the death is of a perſon certain, who can be but once killed. 3 *Aſſiz.* 15. 25. *E.* 3. *Coron.* 136. 22 *Aſſiz.* 55.

And the ſame law ſeems to be in an indictment of robbery, tho it is poſſible ſeveral robberies may be committed at ſeveral days, for ſtill it lies in averment, that it is the ſame notwithſtanding the variance.

If a man be indicted for the robbery or murder of *John a Stiles* and acquitted, and after indicted for the robbery or murder of *John a Nokes*, yet he may plead *auterfoits acquit*, and aver it to be the ſame perſon notwithſtanding the variance in the ſirname, for a man may [245] have divers ſirnames, and he may aver, *que conus per l'un noſme & l'autre.* 26 *Aſſiz.* 5. *Coron.* 189. 11 *H.* 4. 41. *a.*

If *A.* be indicted in the county of *B.* for a robbery or other felony ſuppoſed to be done at *D.* in the county of *B.* and be acquitted, and be afterwards indicted for a robbery upon the ſame perſon in the county of *B.* but at another vill, yet he ſhall plead *auterfoits acquit* notwithſtanding the variance of the vill, and may aver it to be the ſame; but if he be afterwards indicted in the county of *C.* for a robbery ſuppoſed to be committed in the ſame county of *C.* (as it muſt be,) he ſhall never plead *auterfoits acquit* of the ſame robbery in the county of *B.* for the juſtices in the county of *B.* can only inquire touching a felony in that county, and therefore it can never be averred to be the ſame, but it is ſaid, that it is otherwiſe in an appeal. 4 *H.* 7. 5. *b.*

And

And therefore the book of 41 *Aſſiz.* 9. where an acquittal pleaded in a foreign county was allowd, muſt be intended of an indictment removed out of that county, where he was firſt indicted and acquitted.

If *A.* rob *B.* in the county of *C.* and carry the goods into the county of *D.* tho he cannot be indicted of robbery in the county of *D.* yet he may be indicted of larciny in the county of *D.* becauſe the goods were carried thither; but ſuppoſe he be acquitted of larciny in the county of *D.* yet that acquittal is no bar to an indictment of robbery in the county of *C.* becauſe it is another offenſe.

Nay it ſeems, it is no bar to an indictment of larciny in the county of *C.* for tho he be acquitted in *D.* it may be becauſe the goods were never brought into that county, and ſo the felony in *C.* may not be in queſtion, neither can the grand inqueſt or petit jury in the county of *D.* take notice of any felony committed in the county of *C.* and ſo the felony in *C.* is a diſtinct felony from *that* contained in the indictment in *D.*

If *A.* commit a burglary in the county of *B.* and likewiſe at the ſame time ſteal goods out of the houſe, if he be indicted of larciny for the goods and acquitted, yet he may be indicted for the burglary notwithſtanding the acquittal.

And *è converſo*, if indicted for the burglary and acquitted, yet he may be indicted of the larciny, for they are ſeveral offenſes, tho committed at the ſame time. And burglary may be where there is no larciny, and larciny may be where there is no burglary. [246]

Thus it hath happened, that a man acquitted for ſtealing the horſe, hath yet been arraigned and convict for ſtealing the ſaddle, tho both were done at the ſame time.

But if a man be acquit generally upon an indictment of murder, *auterfoits acquit* is a good plea to an indictment of manſlaughter of the ſame perſon, or *è converſo*, if he be indicted of manſlaughter, and be acquit, he ſhall not be indicted for the ſame death, as murder, for they differ only in degree, and the fact is the ſame. 4 *Co. Rep.* 46. *b. Holcroft's* caſe *per cur'*, and upon the ſame reaſon *auterfoits acquit* upon an indictment of murder is a good bar to an indictment of petit treaſon, and *è converſo*.

II. As to the ſecond, what manner of acquittal is a good plea.

It muſt be an acquittal upon trial either by verdict or battle.

And

And therefore, if *A.* be accuſed and committed for felony, but no bill preferred, or *ignoramus* found, ſo that at the end of the ſeſſions he is quit by proclamation, and delivered, yet he may be afterwards indicted. for he is not *legitimo modo acquictatus.*

If *A.* be aſſaulted upon the highway, or in his houſe by thieves or burglars to rob him, and he kill one of the thieves, which is no felony in law, and this matter be ſpecially found by the coroner's inqueſt or grand inqueſt, whereupon he is diſcharged, yet he may be indicted *de novo* ſeven years afterwards for murder or manſlaughter, and cannot plead the acquittal by the grand inqueſt.

But if he had been indicted generally of murder or manſlaughter, and pleaded to it *not guilty*, and this ſpecial matter had been found by the petit jury, and thereupon judgment given, *quòd eat ſine die*, if he be afterwards indicted for the ſame fact, he may plead *auterfoits acquit. Crompt. fol.* 28. *a. Bull's* caſe 26 *Eliz.*

[247] Therefore it is no prudence to have the matter in any caſe found ſpecially by the grand inqueſt or coroner's inqueſt, tho the fact being truly found by them amounts not to felony, as in the caſe before; and ſo *per infortunium*, or *ſe defendendo*.

If *A.* be indicted for felony, and be erroneouſly acquit by the miſtaken direction of the judge, as, for that the felony was not committed the day mentiond in the indictment, yet that miſtake lies not in averment, but to another indictment ſetting the day right he may plead *auterfoits acquit.* 2 *Co. Inſtit.* 318.

If *A.* be indicted of murder or other felony, and plead *non culp.* and a ſpecial verdict found, and the court do erroneouſly adjudge it to be no felony, yet as long as *that* judgment ſtands unreverſt by writ of error, if the priſoner be indicted *de novo*, he may plead *auterfoits acquit* and ſhall be diſcharged: *vide* 9 *H.* 5. 2. *b.* for it is the king's own ſuit, and tho the error appear, and regularly the judgment againſt the king is *ſalvo jure regis*, yet it is otherwiſe in caſe of life.

But if the judgment be reverſt the party may be indicted *de novo*; *quære*, whether in that caſe upon the reverſal upon the point of the verdict the party ſhall not be executed, for the judge *a que* ſhould have given that judgment, but it ſeems *in favorem vitæ* he ſhall be arraigned *de novo*, for poſſibly he hath other matter for his defenſe.

If at common law *A.* had committed murder, and had been arraigned within the year upon an indictment, and had been acquitted, tho this arraignment ſhould not have been, yet it ſtands as a good acquittal

acquittal pleadable to another indictment or appeal: *vide* 8 *H.* 5. 6. *b. Coron.* 463. 16 *E.* 4. 11. *a.*

A. was indicted for the murder of *B.* by poiſoning, and the indictment runs *quòd* B. *fidem adhibens perſuaſioni dicti* A., *neſciens prædictum potum cum veneno fore intoxicatum, recepit & bibit, per quod prædictus* B. *immeditatè poſt receptionem veneni prædicti obiit*; but it is not alleged, *quòd venenum prædictum recepit & bibit*; upon this he was arraigned and acquitted, and had judgment, *quòd eat ſine die.* Afterwards he was indicted again for the ſame offenſe, and pleaded *auterfoits acquit*, and ſhewed the record in certain, and [248] pleaded over to the felony and murder *not guilty.*

It was reſolved, 1. That the indictment was inſufficient for this cauſe. 2. That in this caſe *auterfoits acquit* was no plea, becauſe the indictment itſelf was inſufficient, for it containd not any matter of felony. 3. And ſo he is not *legitimo modo acquietatus*, and ſo the difference is between this caſe and thoſe above of an erroneous judgment, for here the foundation itſelf, namely the indictment contained no felony. 4. But if the error be only in the proceſs in an appeal or indictment, and yet the priſoner appear and plead *not guilty* and be acquit, this acquittal is pleadable 19 *E.* 3. *Coron.* 444. 5. But if he had been attainted upon this inſufficient indictment and judgment given, he ſhould not have been *auterfoits arraigne* upon a new indictment for the ſame offenſe, unleſs the former judgment had been firſt reverſed. 6. But *auterfoits convict* or *auterfoits acquit* by verdict, *&c.* is no plea, unleſs judgment be given upon the conviction or acquittal in any caſe, 4 *Co. Rep.* 44, 45. *Vauxe's* caſe.

And the true reaſon of this judgment is rightly given by my lord *Coke*, *P. C.* 214. becauſe the judgment upon the acquittal is only, *quòd eat ſine die*, which may be upon the defect in the indictment, which the judges are bound to look into, and it ſhall be ſuppoſed, that it was given upon that defect, and not upon the verdict, for the judgment is the ſame in both, but the judgment upon a conviction is, *quòd ſuſpendatur*, which is all the judgment that can be given.

But in the caſe of the ſpecial verdict above, where an erroneous judgment of acquittal is given, yet it is concluſive to the king till the judgment be reverſed by error, for the judgment could be only given upon the verdict, the indictment being ſufficient, and ſo is the diverſity.

And

And *note* generally, that where *auterfoits acquit* or *attaint* is pleaded, yet in *favorem vitæ* he ſhall plead over to the felony, and be tried for the ſame, tho his ſpecial plea be found or adjudged againſt him, *Vauxe's* caſe, *ubi ſupra, &c. & 22 E. 39. b.*

[249] III. The third general is where, and in what ſuits *auterfoits acquit* is a good plea.

If *A.* be appeald of murder of *B.* by *C.* as ſon and heir of *B.* and is acquitted, and in truth *C.* was not the heir, but *D.* and thereupon *D.* brings an appeal, this *auterfoits acquit* is no plea, becauſe not brought by the right party. 21 *H.* 6. 28. *b.* neither is it a bar to the king, but he may be indicted notwithſtanding that acquittal, or if *D.* be nonſuit in his new appeal, he may be arraigned upon that appeal at the king's ſuit. 21 *H.* 5. 28. *b*

If an appeal of murder or robbery be brought by *A.* againſt *B.* and *B.* is thereupon acquit by verdict, regularly this is a good bar to an indictment preferred by the king for the ſame robbery or murder both at common law and at this day.

But an acquittal by battle upon an appeal is held to be no bar to an indictment for the ſame offenſe: *vide Stamf. P. C. Lib.* II. *cap.* 36. *p.* 106. *b.* (*)

And at common law, if *A.* had been arraigned upon an indictment for murder or robbery, tho within the year, if an appeal be after brought for the ſame crime *auterfoits acquit* upon the indictment had been a good bar to the appeal, 16 *E.* 4. 11. *a.*

And therefore the juſtices at common law would rarely arraign a priſoner upon an indictment, eſpecially for murder within the year after the death in favour of the appeal. 22 *E.* 4. *Coron.* 44. unleſs the appellant had been an infant 32 *H.* 6. *Coron.* 278 & 279. or the evidence had been very pregnant. 21 *H.* 6. 28. *b.*

But now by the ſtatute of 3 *H.* 7. *cap.* 1. in caſe of murder or manſlaughter the juſtices ſhall proceed to arraign the priſoner upon an indictment, tho within the year; and if the principal or acceſſary

[250] be acquitted or attainted within the year and day, yet this ſhall be no bar to an appeal againſt them, as if there had

(*) The reaſon aſſigned for this by *Stamford* is, becauſe trial by battle does not lie againſt the king, wherefore he ſhall not be bound by ſuch trial, yet *Stamford* makes a *quære* of this, for *Bract. Lib.* III. *cap.* 19. §. 8. is expreſs to the contrary, and ſays, that if he be acquit by battle, he ſhall go quit not only againſt the appellants, but alſo from the ſuit of the king, *quia per hoc purgat innocentiam ſuam verſus omnes, ac ſi ſe poneret ſuper patriam, & patria omninò ipſum acquietaverit.*

been

been no ſuch acquittal, and therefore tho upon the indictment the offenders be acquit within the year, the court ought not to diſcharge them, but at diſcretion to bail or commit them, till the year and day be paſt, *vide le ſtatute.*

So that by this ſtatute *auterfoits acquit* or *attaint* upon an indictment of murder or manſlaughter is no bar of an appeal for the ſame death, tho on the other ſide *auterfoits acquit* or *attaint* upon an appeal ſtands ſtill a good bar to an indictment for the ſame murder or manſlaughter. *Stamf. P. C. ubi ſupra.* 4 *Co. Rep.* 40. *a. Darley*'s caſe.

But *auterfoits convict* of murder or manſlaughter, and had his clergy upon an indictment is a good bar to an appeal notwithſtanding this ſtatute, for indeed the ſtatute itſelf hath this exception, *the benefit of clergy not being had,* 4 *Co. Rep.* 45. *b. Wigg*'s caſe, and this, tho an appeal were depending, whereunto the priſoner had not pleaded at the time of his acquittal. 4 *Co. Rep.* 45. *b. Holcroft*'s caſe.

But the caſe of other appeals, as of robbery, rape, *&c.* are not within this ſtatute, and therefore *auterfoits acquit* upon an indictment within the year ſtands as at common law a good bar to an appeal of robbery, or any other offenſe other than murder or manſlaughter.

And yet at this day the judges never forbear to proceed upon an indictment of robbery, rape, or other offenſe, altho within the year, and the reaſon is, becauſe appeals of robbery eſpecially are very rare, and of little uſe ſince the ſtatute of 21 *H.* 8. *cap.* 11. gives reſtitution to the proſecutor upon an indictment, as effectually as upon an appeal.

Index to 2 Hawk. P. C. Tit. Bar.

CHAP. XXXII. [251]

Concerning the plea of auterfoits attaint *or* convict *of the ſame felony, or any other offenſe.*

IF *A.* be indicted and convict of felony, but hath neither judgment of death, nor hath prayed his clergy, this is no bar of a new indictment for the ſame offenſe, if the firſt were inſufficient. 4 *Co. Rep.* 45. *a. Vauxe*'s caſe, and it ſeems, tho it were ſufficient, yet it is no bar without clergy or judgment; but if he had his clergy allowd him,

auterfoits convict and had his clergy is a good bar to an indictment, or an appeal for the ſame crime, and ſo remains at this day, notwithſtanding the ſtatute of 3 *H.* 7. *cap.* 1. 4 *Co. Rep.* 40. *a.* 45. *b. Wigg*'s caſe.

And ſo it is tho he prays his clergy, and the court will adviſe upon it, tho the clergy be not actually allowd. (*) 4 *Co. Rep.* 46. *a. Holcroft*'s caſe. *Co. P. C. cap.* 57.

Auterfoits attaint de meſme felonie, tho upon an inſufficient indictment, was at common law a bar to appeals, as well as indictments of the ſame offenſe. 4 *Co. Rep.* 45. *a. Vauxe*'s caſe, and remains ſo ſtill at this day in all caſes but in appeals of death, which is alterd by the ſtatute of 3 *H.* 7. *cap.* 1.

If *A.* be attaint of felony by outlawry, yet, if he reverſe the outlawry, he ſhall be put to anſwer the ſame felony, and plead to the indictment, whereof he was outlawd; but if he reverſe the outlawry for this error, becauſe he was *auterfoits acquit* for the ſame felony, (which, as before is ſaid, is aſſignable for error,) he ſhall be diſcharged of the indictment, for it ſtands as well a plea to the indictment, as an error in the outlawry.

[252] If *A.* be indicted of piracy and refuſing to plead hath judgment of *peine forte & dure*, and by the general pardon piracies are excepted, but the judgment of *peine forte & dure* is pardoned by the general words of all contempts, *quære*, whether he may be arraigned for the ſame piracy, but by the better opinion he may be arraigned of any other piracy committed before that award, 14 *Eliz. Dy.* 308. *a.*

If *A.* be attaint of treaſon or felony by outlawry, yet he ſhall not be *de novo* indicted or appeald for the ſame felony till the outlawry be reverſed, for *auterfoits attaint* of the ſame felony is a good plea. *Co. P. C.* 213.

Auterfoits attaint de murder is a good plea to an indictment of petit treaſon.

If *A.* had been indicted at common law of felony, and had judgment of death, yet he may notwithſtanding his attainder be arraigned for treaſon committed before the felony for the advantage of the king, who is to have the eſcheat, but not for a treaſon committed after the felony. 1 *H.* 6. 5. *b. Stamf. P. C. Lib.* II. *cap.* 37. *fol.* 107. *b.* But

(*) See the caſe of *Armſtrong* and *Liſle*, *Kel.* 103, 104.

in

in this my lord *Coke* differs from *Stamford*, and ſaith that for a treaſon committed *after* he ſhall be arraigned. *Co. P. C. p.* 213. *(a)*

If *A.* commit divers robberies, one upon *B.* another afterwards upon *C.* and afterwards another upon *D.* and they bring ſeveral appeals, and he be attaint at the ſuit of *B.* yet he ſhall be put to anſwer to the appeals of *C.* and *D.* for the benefit of the reſtitution of their goods. *Stamf. ubi ſupra.*

And if there be an indictment and attainder at the proſecution of *B.* yet *quære*, whether after at the proſecution of *C.* he may not be put to anſwer an indictment at his proſecution to have benefit of reſtitution upon the ſtatute of 21 *H.* 8. *cap.* 11. *Stamf. Lib.* 3. *cap.* 10.

It ſeems in that caſe there may be an inqueſt of office to inquire of the robbery of *C.* ſo as to intitle him to reſtitution without arraigning the party upon an indictment of *C.*

If *A.* commit ſeveral felonies and be attaint for one of thoſe felonies, and the king pardon that attainder and the felony, [253] for which he was attaint, if he be after indicted or appeald for the ſame felony, he may plead his attainder, and it will be no good replication to ſay he was pardoned after.

But yet he may be indicted or appeald for the other felonies, and if he plead his former attainder, it is a good replication to ſay he was pardoned after, whereby he is now reſtored to be a perſon able to anſwer to thoſe offenſes. 6 *H.* 4. 6. *b.* 10 *H.* 4. *Coron.* 227. *vide contra Co. P. C. p.* 213.

And ſo if a perſon attaint commit a felony after, and be pardoned the firſt felony and attainder, yet he ſhall be put to anſwer the new felony. 6 *H.* 4. 6. *b.*

If *A.* commit ſeveral felonies and be convict for one of them, but no judgment of death nor clergy given him, he may be indicted for all thoſe former felonies. *Stamf. ubi ſupra.*

But if he had been convict for any one felony and prayed his clergy, and read and been deliverd to the ordinary, he ſhould never be arraigned for any of thoſe former felonies. And it ſeems by the better opinion, that if he had prayed his clergy, *& tradito ei libro legit ut clericus*, but no award of *traditur ordinario*, yet he ſhould not be arraigned for any felony committed before his clergy allowd, for it was

(a) The caſe in 1 *H.* 6. 5. *b.* was of a treaſon ſubſequent to the felony, and therefore rather makes againſt *Stamford* in favour of lord *Coke*'s opinion.

the fault of the court, that they did not award *tradatur ordinario.* 4 *Eliz. Dy.* 211. *b. Co. P. C. cap.* 57.

And the reaſon is, becauſe the ſtatute of 25 *E.* 3. *cap.* 5. *pro clero* enacts, that he ſhall be arraigned of all his offenſes together, and then deliverd to the ordinary, and therefore if once deliverd to the ordinary, all his capital offenſes committed before are in effect diſcharged, and therefore at leaſt before the priſoner departs from the bar after his clergy allowd, he muſt be indicted, or otherwiſe he is for ever diſcharged.

But for any felony committed after conviction and clergy allowd, he may be indicted and arraigned, but not if he ſtands attainted and unpardoned.

[254] But at this day that old law concerning the diſcharge of offenſes by clergy allowd is alterd.

By the ſtatute of 8 *Eliz. cap.* 4. it is enacted, "That if any per-
"ſon admitted to his clergy ſhall before ſuch his admiſſion have
"committed any offenſe, whereupon clergy is not allowable by the
"laws and ſtatutes of this realm, and not being thereof indicted and
"acquitted, convicted or attainted, or pardoned ſhall and may be in
"dicted or appeald for the ſame, and put to anſwer, as if no ſuch
"admiſſion to clergy had been.

And by the ſtatute of 18 *Eliz. cap.* 7. delivery to the ordinary is taken away, and burning in the hand wholly ſubſtituted in lieu thereof, and that every perſon admitted to his clergy ſhall anſwer ſuch felonies or offenſes, as he ſhould have done, if he had been deliverd to the ordinary and made his purgation.

So that now clergy doth diſcharge all offenſes precedent within clergy, but not ſuch other offenſes, as are out of the benefit of clergy.

There remains one ſpecial kind of *auterfoits acquit* of another perſon, than he that pleads it, which I ſhall mention and ſo conclude this chapter.

The acceſſary upon his arraignment may plead the acquittal of the principal.

A gaoler arraigned for the voluntary eſcape of a priſoner for felony may plead the acquittal of the felon of the principal felony, and ſo may the reſcuer arraigned upon an indictment for reſcue of a felon, and that is the reaſon, that the gaoler and reſcuer ſhall never be arraigned till the principal felon be tried and convicted, becauſe if he be acquitted, the gaoler or reſcuer cannot be guilty of felony.

If

If *A.* ſteal the goods of *B.* and break priſon, *A.* may be arraigned or the felony of breaking priſon before the arraignment upon the principal felony, but if *A.* be arraigned upon the principal felony and acquitted before conviction of the felony for breaking the priſon, *A.* may plead this acquittal, for hereby that felony is purged before his conviction, this was Mrs. *Samford's* caſe in *Kent* for ſtealing the goods of the earl of *Leiceſter*. (*) [255]

To conclude this whole matter of *auterfoits acquit*, *convict* or *attaint* theſe things are to be obſerved. 1. The party that pleads the record muſt plead it ſpecially ſetting forth the record. 2. He muſt either ſhew the record *ſub pede ſigilli*, or have the record removed into the court, where it is pleaded by *certiorari*, or if it be a record of the ſame court muſt vouch the term, year and roll, for the record is part of his plea. 3. He muſt make averments, as the caſe ſhall require, as that he is the ſame perſon, that it is the ſame offenſe. 4. No iſſue ſhall be taken upon the plea of *nul tiel record*, becauſe it is pleaded in court, but the king's attorney may have *oyer* of the record. 5. The averments are iſſuable. 6. If iſſue be taken upon them they ſhall be tried by the jury, that is returned to try the priſoner by the ſtatute of 22 *H.* 8. *cap.* 14. 7. He, that pleads theſe pleas, muſt alſo plead over *not guilty* to the felony, for if the pleas be adjudged againſt him, yet he ſhall be tried upon the *not guilty*.

See Index to 2 Hawk. P. C. Tit. Bar.

(*) *Vide ſupra, Part* I. *p.* 612.

CHAP. XXXIII.

Concerning pleas to the felony, viz. Not guilty.

REGULARLY, where a man pleads any plea to an indictment or appeal of felony that doth not confeſs the felony, he ſhall yet plead over to the felony *in favorem vitæ*, and that pleading over to the felony is neither a waving of his ſpecial plea, nor makes his plea inſufficient for doubleneſs. 22 *E.* 4. 39. *b.*

And therefore, if he pleads any matter of fact to the writ or indictment, or pleads *auterfoits convict*, or *auterfoits acquit* he ſhall [256] plead

plead over to the felony; and altho he doth it not upon his plea, but his plea be found or tried againſt him, yet he ſhall not be thereby convict without pleading to the felony and trial thereupon. 22 *E.* 4. 39. *b.*

But if a man plead to the juriſdiction of the court, as if an indictment of rape be found before the ſheriff in his *Turn* and deliverd to the juſtices, becauſe the ſheriff hath no juriſdiction to take an indictment of rape, the priſoner may plead to it without anſwering to the felony, thus it was done, 22 *E.* 4. 22. *b.* which was one *Wheeler's* caſe; ſo if the juſtices of the peace ſhould arraign one for treaſon.

Or if a man plead a plea, that confeſſeth the fact, as a releaſe in an appeal, he ſhall not plead over to the felony. 22 *E.* 4. 39. *b.* 9 *H.* 4. 1. *b.*

But yet even in that caſe it ſeems to me, that he may, if he pleaſe, plead over to the felony *not guilty*, and accordingly it is held by *Markham*, 7 *E.* 4. 15. *a.* in caſe of a releaſe.

If *A.* be indicted of felony and plead the king's pardon, for inſtance, if the indictment be of murder, and the party plead a pardon of felonies, or the like, he ſhall not need to plead over to the felony, becauſe it ſuits not with his plea.

And yet, if the pardon upon a demurrer of the king's attorney, or upon adviſement of the court be adjudged inſufficient, the party ſhall not be thereupon convict, but ſhall be put to plead to the felony and be tried for it, and yet the pleading of the pardon is a kind of confeſſion of the fact, but yet *in favorem vitæ* the party ſhall be put to anſwer the felony (*); and thus it was done in the caſe of *Rutaby*, (†) who was indicted for murder in *Durham*, and the indictment removed by *certiorari* into the king's bench, and there he pleaded the king's pardon of murder, which for ſome defects were adjudged inſufficient to pardon him.

He was thereupon remanded, and the indictment remitted, and tried for the fact in *Durham*, and, as I have heard, acquitted. *Hill* 1653.

[257] And regularly in all caſes of felony or treaſon, where a man pleads a ſpecial matter, tho he conclude his plea with *not guilty* to the felony, or doth not conclude it ſo, yet if his plea be tried or found, or ruled againſt him, he ſhall be put to his plea of *not*

(*) *Vide ſupra, p.* 239. (†) *Vide ſupra, Part* I. *p.* 467, *Part* II. *p.* 212.

guilty

guilty and be tried for the felony, for tho a man ſhall loſe his land in ſome caſes for miſpleading, yet he ſhall not loſe his life for miſpleading. *Stamf. P. C. Lib.* II. *cap.* 34. *fol.* 98. *b.*

And therefore the book of 14 *E.* 4. 7. *a.* that ſaith, if the appelee demurs, and it be judged againſt him, it is peremptory, and he ſhall be executed, muſt be underſtood *cum grano ſalis*; and therefore *Brook* in abridging it, *B. Peremptory* 86. makes doubt of it.

But the true difference ſeems to be this, if a perſon be indicted or appeald of felony and he will demur to the appeal or indictment and it be judged againſt him, he ſhall have judgment to be hanged, for it is a confeſſion of the indictment, and indeed a wilful confeſſion, for he may have all the advantages of exception to the inſufficiency of the indictment or appeal by way of exception either before his plea of *not guilty*, or after his conviction and before judgment, as he might have by demurrer, and in caſe of his demurrer no judgment of *peine fort & dure* can be given, becauſe the demurrer is a plea, and thus the book of 14 *E.* 4. 7. *a.* and 7 *E.* 4. 29. *a.* are to be underſtood, and accordingly 2 *Co. Inſtit.* 178. *ſuper ſtat. Weſtm.* 1. *cap.* 12.

But if the priſoner pleads in bar, and concludes, as he ought to the felony, or plead a pardon, where he concludes not to the felony, and the attorney general demur, and he join in demurrer, and it be adjudged againſt the priſoner, yet he ſhall be put to anſwer the felony, for this demurrer is no confeſſing of the indictment, and it is all one, as if his plea were found againſt him by the jury, or by certificate of the biſhop, which yet is not ſo peremptory *(a)* but he ſhall be after tried for the felony. *Stamf. P. C. Lib.* II. *cap.* 34. *fol.* 98. *b.*

If *A.* be indicted of murder and he hath the king's pardon of manſlaughter, if he be arraigned upon the indictment for murder, he muſt not plead generally *not guilty*, for then he waves his pardon, but he muſt confeſs the indictment as to manſlaughter and plead thereunto the king's pardon, and as to the murder, *viz. interfection' ex malitiâ præcogitatâ* he is to plead *not guilty*, and if he be found guilty of murder, he ſhall have judgment, if acquit of the murder, then his plea ſhall be allowd, and thus I directed it in Sir *Thomas Pettus*'s caſe in *Norfolk* about 24 *Car.* 2. and it is purſuant to the direction of the ſtatute of 13 *R* 2. *cap.* 1. which requires, that before the pardon allowd it ſhall be inquired by the country, [258]

(a) See 14 *E.* 4. 7. *a.*

whether the party were ſlain of malice prepenſe, and if ſo, the pardon to be diſallowd.

Now the plea to the felony conſiſts of two parts, *viz.* 1. The iſſue of *not guilty*. whereunto the clerk joins iſſue *cul. priſt.* 2. The putting himſelf upon the country, when the clerk demands how he will be tried.

If either of theſe fail, it is in law a ſtanding mute, whereupon in caſe of felony he is put to his penance, and in caſe of treaſon he hath judgment, as upon a *nihil dicit*, and ſo is attainted. 14 *E.* 4. 7. *a.*

In caſe of an indictment of felony or treaſon there can be no juſtification made, as a man cannot plead, that what he did was *ſe defendendo*, or in his defenſe againſt a burglar or robber, tho it amount in truth to no felony.

And the reaſon is, becauſe the indictment ſuppoſeth in treaſon, that the fact was done *proditoriè & contra ligeantiæ ſuæ debitum*, and in felony, that the fact was done *felonicè*, which is the point of the indictment, and muſt be anſwered directly, but upon *not guilty* pleaded he ſhall have the advantage of all ſuch defenſes, as he can make to acquit himſelf of the felony or treaſon, and may give all his ſpecial defenſe in evidence, tho the matter of fact be proved upon him, and ſo it is the moſt advantageous plea for the priſoner.

If dureſs and compulſion from others will excuſe him or his own neceſſary defenſe in ſafe-guard of his life, or any other matter, the jury upon the general iſſue ought to take notice of it, and to [259] find their verdict accordingly, as effectually, as if it were or could be ſpecially pleaded.

And now we have brought the priſoner to his trial, wherein we ſhall now proceed. And theſe trials of priſoners are of two kinds, *viz.* by battle, or by the jury.

The former doth not concern indictments, for therein there is no trial by battle, but concerns only appeals and approvers, and I ſhall therefore defer the diſcuſſion of trials by battle, till I come to conſider of appeals in the end of this book, and proceed to the buſineſs of trial by jury.

CHAP.

CHAP. XXXIV.

Touching the trial *of offenders* by jury, *and firſt*, the proceſs.

AFTER the priſoner hath pleaded and put himſelf upon the country, the next thing in order of proceeding is the trial of the offender.

And therein theſe things will be neceſſary to be conſidered. 1. The proceſs, that brings in the jury to try the priſoner. 2. The return to be made of them, and of what nature and quality they ought to be. 3. What is to be done, if they appear not, or be challenged off. 4. Concerning the challenge of the king, or of the priſoner unto them, if they do appear. 5. The trial and allowance, or diſallowance of the challenge. 6. The order of the ſwearing of the jury. 7. The evidence to be given to the jury, what, and how, and in what manner. 8. The demeanor of the jury before and at the time of the delivering of the verdict. 9. The verdict itſelf, how to be given and ordered by the jury and by the court. 10. What is to be done in caſe of miſcarriage of the jury either in their verdict, [260] or the circumſtances that attend it.

I. And firſt therefore I will conſider what, and how proceſs is to iſſue to bring in the jury.

And this will be various according to thoſe courts or judicatories, wherein the priſoner is to be tried, *viz.* 1. In the king's bench. 2. Before commiſſioners of *oyer* and *terminer*. 3. Before juſtices of gaol-delivery. 4. Before juſtices of peace, for theſe are the uſual tribunals, where matters of this nature are determined.

1. Therefore, as to the king's bench.

If the offence be committed in the county, where the king's bench ſits, and the indictment be originally taken in the king's bench, and the priſoner arraigned there, the court may proceed *de die in diem* in the term-time, and there needs not fifteen days between the *teſte* and return of the *venire fac'* to bring in the jury. 9 *Co. Rep.* 118. *b.* lord *Sanchar*'s caſe.

And the ſame law is, if the offenſe be committed in the ſame county where the king's bench ſits, and the indictment be taken before juſtices

juſtices of peace of the ſame county, and removed into the king's bench by *certiorari*, and the priſoner be there arraigned and plead.

But if the offence be committed, and the indictment taken in another county than where the king's bench ſits, and it be removed into the king's bench by *certiorari*, and the priſoner be there arraigned and pleads, there muſt be fifteen days between the *teſte* and return of the *venire fac'* or other proceſs. Lord *Sanchar's* caſe. 9 *Co. Rep. ubi ſupra.*

The *venire fac'* as all other proceſs of that court, iſſues in the king's name under the ſeal of the court and *teſte* of the chief juſtice, and always ought to bear *teſte* after the iſſue joined between the king and the priſoner.

2. As to the commiſſion of *oyer* and *terminer*. Tho there goes out a general precept in the name of three or more of the commiſſioners, and under their ſeals fifteen days before their ſeſſion directed to the ſheriff to return twenty-four jurors to try the iſſue between the king and the priſoners to be arraigned, yet this is but preparatory, and to have a jury in readineſs; for after the priſoners are arraigned and pleaded to the country a precept ought to iſſue to the ſheriff in nature of a *venire facias*, which may bear *teſte* the ſame day, that the priſoners plead, commanding the ſheriff to return twenty-four, *&c.* to try the iſſue upon ſuch a day, and this precept muſt be in the names and under the ſeals of the commiſſioners or three of them, whereof one of the *quorum*, 4 *Co. Inſtit. cap.* 28. *p.* 164. and not barely by an award upon the roll.

[261]

Or they may make their precept returnable the ſame day that the priſoner pleads, *viz. ad horam primam poſt meridiem*, *&c.* for juſtices of *oyer* and *terminer* may take their indictment, and arraign the priſoner and try him the ſame day, againſt the opinion of 22 *E.* 4. *Coron.* 44. as appears by the precedents cited 4 *Co. Inſtit. ubi ſupra*, and by common experience.

If they make their precept returnable any day after, as for inſtance the ſecond day of the ſeſſions, they muſt not only make an adjournment, but record the adjournment, or elſe it will be intended returnable after their ſeſſions, for the ſeſſions is intended only the firſt day and no longer, unleſs an adjournment be entred.

3. Juſtices of gaol-delivery, after the priſoner hath pleaded, may take his pannel from the ſheriff without making any precept to him, 4 *H.* 5. *Enqueſt* 65. 4 *Co. Inſtit. cap.* 30. *p.* 168. the reaſon given is, becauſe juſtices of gaol-delivery ſend out a general commandment to the

the ſheriff before their ſeſſion to return juries againſt they come, otherwiſe it is, where they have a ſpecial commiſſion *per Hankf.*

But this is not the reaſon, for ſo it is done by juſtices of *oyer* and *terminer* and juſtices of peace, and yet they make ſpecial precepts of *venire fac' vide antea, cap.* 4.

4. Juſtices of peace, as to the point of their precepts of *venire fac'* agree with juſtices of *oyer* and *terminer*, for they are as to this purpoſe commiſſioners of *oyer* and *terminer*, and may indict, arraign and try the ſame day in caſes of felony, as it is agreed 4 *Co. Inſt. p.* 164. and uſual practice. [262]

Now there be certain general obſervations touching the proceſs againſt the jury.

1. In all caſes, where the proceſs is by writ or precept, as well the award, as the writ or precept ought to mention truly the *viſne*, from whence the jury ſhall come, and where it is only by award without writ or precept, as in caſe of the juſtices of gaol-delivery, the award ought to mention the *viſne*, from whence the jury ſhall come.

As if a murder be ſuppoſed to be at *D.* the *venire fac'* ought to return a jury *de vicineto de D.*

If the murder be alledged *apud civitatem Briſtol*, the *venire fac'* is moſt properly *de Briſtol*, and it is good, becauſe a city, 7 *H.* 4. 13. *a. Enqueſt* 36. but if it be from a place not a city, it muſt be *de vicineto de D.*

But tho it be a city, yet the *venire fac' de vicineto civitatis Briſtol* is good, tho it be alſo a county, as hath been often reſolved againſt the opinion of *Stamford, Lib.* III. *cap.* 4. *fol.* 154. *b.*

If the ſtroke be laid at *B.* and the death at *C.* in the ſame county, the *venire fac'* muſt be *de vicineto B. & C.* becauſe both make the felony.

But by the ſtatute *(a)*, where the ſtroke is in one county, and the death in another, the indictment ſhall be, where the death was, and the *viſne* ſhall be from the place, where he is alledged to die, for neceſſity, becauſe the proceſs is not to go into the other county.

If a murder be laid *in quadam plateâ vocat'* Kings-ſtreet *in parochiâ Sanctæ* Margaritæ, *apud civitatem* Weſtm. the *viſne* ſhall be neither from *Kings-ſtreet*, becauſe it is alledged to be only *platea* nor *de vicineto civitatis Weſtm.* but *de vicineto parochiæ Sanctæ Margaritæ*, becauſe more certain. 6 *Co. Rep.* 14. *a. Arundel's* caſe.

(*a*) 2 & 3 *E.* 6. *cap.* 24.

But

But if a murder be laid *apud B. in parochiâ de C.* the *venire fac'* ſhall be *de vicineto de B.* becauſe more certain, for it ſhall be intended a vill or hamlet within a pariſh, and by common intendment a pariſh may contain many vills. 11 *Co. Rep.* 25. *b. Harper's* caſe. [263]

But at this day by the ſtatute of 22 *H.* 8. *cap.* 2. made perpetual by 32 *H.* 8. *cap.* 3. if a foreign plea be pleaded in caſe of an indictment of felony, it ſhall be tried by the jury, that ſhould try the iſſue of *not guilty*, but in caſe of an indictment of treaſon, as I have before ſaid, that ſtatute takes not place, but it ſhall be tried by a jury of that place or county, where the foreign matter pleadeth ariſeth.

2. As to the number of the jury the *venire fac'* or precept is only *venire fac'* twelve, but the ſheriff ought to return twenty-four.

But the general precept, that iſſues before a ſeſſions of gaol-delivery, *oyer* and *terminer*, and of the peace before mentioned is to return twenty-four, and commonly the ſheriff returns upon that precept forty-eight.

But the award or precept to try the priſoner after he hath pleaded is only *venire fac'* twelve, and twenty-four are returned by the ſheriff upon that pannel.

3. Touching the manner of the precept, writ, or award.

If *A. B. C.* and *D.* be indicted for one felony or murder before any juſtices, they may iſſue one *venire fac'* or may iſſue ſeveral *venire fac'* or precepts, or awards of that kind.

If the *venire fac'* be joint, then if *A.* challenge twenty peremptorily, or challenge for cauſe, the jurors challenged ſhall be drawn againſt all, for each may have his ſeveral challenge, and the like, if it were in an appeal; ſo that, if there were eighty upon the pannel, they may be all challenged off by their ſeverel peremptory challenges, which is a great inconvenience, and therefore in ſuch caſe they antiently uſed to ſever the priſoners, and ſo put them to challenge apart, whereby they may poſſibly hit upon the ſame perſons. 9 *E.* 4. 27. *b.* 21 *H.* 6. 22. *a.* 22 *H.* 6. 4. *a.* therefore the beſt way is to make out ſeveral *venire fac'* and conſequently, if the pannel be challenged off, yet forty *tales* may be granted upon each *venire fac'*.

And if the *venire fac'* in an appeal be once granted jointly, it cannot be afterwards ſevered, neither can there be ſeveral *tales*, for if the *venire fac'* be joint, the *tales* muſt be joint. 27 *H.* 6. 5 & 6. [264]

And

And it ſeems, that in caſe of an indictment, tho it be the king's ſuit, if once a *venire fac'* iſſue joint, there cannot iſſue a ſeveral *venire fac'* nor a ſeveral *tales*, which in many caſes may much delay, if not fruſtrate the trial.

But before juſtices of gaol-delivery, where there is no precept but only an award, tho at firſt the award be joint, and the pannel accordingly returned by the ſheriff, and the priſoners challenge peremptorily ſeverally, whereby there are not enough left upon the pannel to try them, and a *tales* is awarded returnable the next day, yet the court may ſever the firſt award and alſo the *tales*. *Plow. Com.* 100. *a. b. Saliſbury*'s caſe adjudged.

It is therefore conſiderable, whether the difference between the caſes of the old books and this be, that thoſe were of an appeal, which is the party's ſuit, and this of an indictment, which is the king's ſuit, or rather, (as I think,) becauſe this was in caſe of juſtices of gaol-delivery, where there is neither writ nor precept, but a command *ore tenus*, and when the record is made up, then an award upon the roll, which the juſtices may model, as they pleaſe, at any time before the trial, and requires not ſuch ſtrict formality as a writ. 4 *H.* 5. *Enqueſt* 55.

II. The ſecond general is touching the return of the ſheriff upon the precept, and the quality of the jurors.

Upon the writ or precept, or command to the ſheriff he ought to make the return, whether the place or *viſne* be within a franchiſe or not, and cannot return a *mandavi ballivo*, as in ſome caſes of appeals, for here the writ is for the king, and therefore with a *non omittas propter aliquam libertatem.*

The writ commands him to return *duodecim liberos & legales homines de vicineto*; they muſt be, 1. Freemen and regularly freeholders. 2. *Legales*, without any juſt exception. And 3. They are to be *de vicineto*, but this is not neceſſarily required, for they of one ſide of the county are by law *de vicineto* to try an offenſe of the other ſide of the county.

But concerning the quality of the jurors more ſhall be ſaid, when we come to conſider of challenges. [265]

The jurors returned by the ſheriff were, at common law, thoſe, that were to try the priſoners, but by the ſtatute of 3 *H.* 8. *cap.* 12. all pannels returned by ſheriffs or their miniſters, (which be not between party and party,) before any juſtices of gaol delivery, or of the peace,

peace, whereof one of the *quorum*, ſhall be reformed by putting to, and taking out the names of the perſons impannelled, by diſcretion of the juſtices, before whom ſuch pannel ſhall be returned, and the pannels ſo reformed ſhall be good and lawful, and the ſheriff ſhall return the pannel ſo reformed upon pain of 20*l.*

This ſtatute, which began to be ſet on foot 11 *H.* 7. *cap.* 24. hath much reformed many practices of ſheriffs in packing of juries in caſes capital.

Note, tho the preamble of this ſtatute mentions inqueſts of inquiry, the body of the act ſeems to extend to all pannels, as well of the petit jury, as of the grand inqueſt, and ſo it hath been conſtantly practiſed, for if a priſoner be arraigned before the judge that ſits upon the crown-ſide, it hath been always uſual for the judge to ſend for a jury to the judge of *niſi prius*, and when the jury is brought, the ſheriff returns them between the king and the priſoner, which is by virtue of this ſtatute.

Where the jury muſt be *de medietate linguæ*, and other matters relating to the quality of the jurors will be conſidered, when we come to conſider of challenges.

III. The third general is to conſider what is to be done, if the jury appear not, or be ſo challenged off, that there are not enough upon the pannel to try the priſoner.

If the proceſs be in the king's bench, and the jury fill not, or be challenged off, that there are not enough to try the priſoner, there ought to iſſue a *diſtringas juratores*, and a command to return *tales*.

But if the whole jury be challenged off, then a new *venire facias*, and if none of the jury appear, then a *diſtringas juratores* ſhall iſſue, and no *tales*.

[[266] But if ſome of the jury appear, but not a full jury, or if ſo many of them, that appear, are challenged off, that there remains not a full jury, a *diſtringas* ſhall iſſue with a *tales*.

If a full jury appear, and before they are ſworn one of them die, ſo that there remains not a full jury, a *tales* ſhall be granted, and ſo it is, if one juryman dies after he be returned and ſworn. 12 *H.* 4. 10. *a*. 20 *E.* 4. 11 *b*.

If a *tale* iſſue, and they do not appear full, or be challenged off, ſo that thoſe that appear upon the principal pannel and *tales* make not up a full jury, another *tales* may be granted. 14 *H.* 7. 1. *b*.

In

In caſe of felony a *tales* may be granted of a greater number than the principal pannel in reſpect of challenges, ſo that there may be forty *tales* or more. 14 *H.* 7. 7. but if ſeveral ſucceeding *tales* be granted, the latter muſt be leſs in number than *that* which was next before, unleſs the array of the preceding *tales* be quaſhed, and then the number of the next may equal it. 20 *H.* 6. 40. *a.*

The times between the *teſte* and return of the *tales* muſt be (as it ſeems,) as in the principal *venire fac'*, *viz.* if the indictment be in a foreign county and removed into the king's bench, fifteen days, if in the ſame county, *de die in diem.*

If the indictment be before juſtices of *oyer* and *terminer*, the *tales*, as well as the principal pannel, ought to be by precept in the names of three of the juſtices, and may be made returnable *de die in diem*, or *de horâ in horam* of the ſame day.

And as to all other matters they reſemble the proceedings in the king's bench, *viz.* the number, the manner, and times of granting it, and ſo need not be repeated.

Before juſtices of gaol-delivery this learning of *tales* is not of much uſe, becauſe there is no particular precept to the ſheriff to return either jury or *tales*, but the general precept before the ſeſſions and the award, or command of the court upon the plea of the priſoner. 4 *H.* 5. *Enqueſt* 55. *Stamf. P. C. Lib.* III. *cap.* 6. *fol.* 155. *b.*

And yet, *vide Plow. Com.* 100. *a.* in *Saliſbury*'s caſe before juſtices of peace and gaol-delivery, a *tales* granted returnable the next day. [267]

See 4 Blacks. Com. ch. 27. of Trial, &c. Index to 2 Hawk. P. C. Tit. Trial. See 2. Hawk. P. Coron. ch. XL. XLI. XLII.

CHAP. XXXV.

Concerning challenges, *and firſt, of* peremptory challenges.

CHALLENGES in reſpect of the parties taking them are of two kinds. 1. Challenges by the priſoner. 2. Challenges by the king.

Challenges by the priſoner are of two kinds. 1. Without cauſe ſhewn, which are commonly called peremptory challenges. 2. With cauſe

cauſe ſhewn, which again are of two ſorts. 1. Of the array. 2. To the poll.

In this chapter I ſhall conſider peremptory challenges what they are, and what is to be done upon them.

By the common law, if a man were outlawed of felony or treaſon, and brought a writ of error upon the outlawry, and aſſigned ſome error in fact, whereupon iſſue was joined, he ſhould not challenge peremptorily or without cauſe. *Stamf. P. C. Lib.* II. *cap.* 7. *fol.* 158. *a.*

The like law ſeems to be, if he had pleaded any foreign plea in bar or in abatement, which went not to the trial of the felony, but of ſome collateral matter only.

But if a man be indicted or appealed of treaſon or felony, and plead *not guilty*, or plead any other matter of fact triable by the ſame jury, and plead over to the felony, becauſe his life is now at ſtake he might challenge peremptorily and without cauſe any jurors under the number
[268] of three whole juries, namely thirty-five of the jurors returned, and they are to be withdrawn out of the pannel; and this was *in favorem vitæ*, *Moore* 12.

And if twenty men were indicted for the ſame offenſe, tho by one indictment, yet every priſoner ſhould be allowed his peremptory challenge of thirty-five perſons. 9 *E.* 4. 27. *b.*

And if there were but one *venire fac'* awarded to try them, the perſons challenged by any one ſhould be withdrawn againſt them all. 9 *E.* 4. 27. *Plow. Com.* 100. *Saliſbury*'s caſe.

But if he had peremptorily challenged above thirty-five perſons, and inſiſted upon it, and would not leave his challenge, then in caſe of an indictment of high treaſon, it amounted to *nihil dicit*, and judgment of death ſhould be given againſt him.

But in caſe of petit treaſon or felony the priſoner was antiently put to *peine fort & dure*, as declining the trial by law appointed, the conſequence whereof was only the forfeiture of his goods, but it amounted to no attainder, and conſequently no eſcheat of his lands; *vide* 14 *E.* 4. 7. *a. Plow. Com.* 262. *b.* and thus the practice was until the beginning of *H.* 7. *vide* 17 *Aſſiz.* 6. 17 *E.* 3. 23. *a.*

But afterwards by the advice of all the judges of both benches it was reſolved, that the party ſo peremptorily challenging above thirty-five ſhould have judgment of death, and it amounted to an attainder, 3 *H.* 7. 12. *a. Co. P. C.* 227, 228, for having pleaded to the felony, and put himſelf upon the country here could be no ſtanding mute, and there-

fore

fore the judges reſolved on this courſe, as moſt conſonant to law, to be practiſed in all circuits. 3 *H.* 7. 12. *a.*

But for all this the better opinion of latter times, as well as of former is, that the judgment in caſe of ſuch a peremptory challenge of above thirty-five at the common law before 22 *H.* 8. in caſe of felony was not an attainder but only penance according to the reſolution of the judges in the time of *E.* 4. mentiond by *Huſſey* 3 *H.* 7. 12. *a.* *Stamf. P. C. Lib.* II. *cap.* 61. *fol.* 150. *b.* *Stamf. prærogat.* 46. *a.* *Plow. Com.* 262. *b. per Weſton.*

And in this caſe the jury it ſeems was not to be ſworn, but the judgment was given ſingly upon his peremptory challenge. [269]

And yet, if a priſoner plead *not guilty*, and put himſelf upon the country, and the priſoner challenge peremptorily under three juries, *viz.* thirty-five, whereby the jury remains, and a *tales* is granted, and the jury appears, and the priſoner then ſtands mute, yet the jury ſhall paſs upon him upon his plea of *not guilty*, which he had before pleaded. 15 *E.* 4. 33. *b.*

But by the ſtatute of 22 *H.* 8. *cap.* 14. it is enacted, "That no "perſon arraigned for petit treaſon, murder, or felony be admitted to "any peremptory challenge above the number of twenty, this act "was continued until 32 *H.* 8. *cap.* 3. and then made perpetual.

By the ſtatute of 33 *H.* 8. *cap.* 23. it is enacted, "That in caſes "of high treaſon, or miſpriſion of treaſon, peremptory challenge "ſhall not be allowd."

But notwithſtanding theſe ſtatutes, by the ſtatute of 1 & 2 *P.* & *M. cap.* 10. enacting, "That all trials for *any* treaſon ſhall be ac- "cording to the due order and courſe of the common law," peremptory challenge of thirty-five or under, is, at this day, allowable in caſes of high treaſon and petit treaſon. *Co. P. C.* 227. *Stamf. P. C. Lib.* 3. *cap.* 7. *fol.* 158. *a.*

And conſequently all the conſequences thereof, namely the attainder of the priſoner, that peremptorily challengeth above thirty-five in an indictment of high treaſon or petit treaſon, ſtand as at common law.

But as to all murders and other felonies the ſtatute of 22 *H.* 8. *cap.* 14 taking away the peremptory challenge of above twenty ſtands in force. *Co. P. C.* 227, 228.

But then ſuppoſe the priſoner in caſe of felony peremptorily challenges above twenty, what ſhall be done? ſhall judgment of death be given, as where he challenged above thirty-five at common law? And it ſhould ſeem, by the opinion of former times, it ſhould.

[270] For the ſeveral ſtatutes, that ouſt clergy in caſe of challenging above twenty, import, that by ſuch challenge the party ſhould be convict, otherwiſe clergy were needleſs to be ouſted upon ſuch challenge, as 25 *H.* 8. *cap.* 3. *vide* 11 *Co. Rep. Poulter's* caſe 30 *b.* 4 & 5 *P. & M. cap.* 4.

But yet, if he challenge above twenty, as the law ſtands at this day, he ſhall not have judgment of death, but only his challenge ſhall be over-ruled, and the jurors ſworn for two reaſons. 1. Becauſe the ſtatute hath made no proviſion to attaint the felon, if he challenge above the number of twenty. 2. Becauſe the words of the ſtatute of 22 *H.* 8. are, *That he be not admitted to challenge above the number of twenty*, ſo that, if he challenge above twenty peremptorily, his challenge ſhall be only diſallowd. *Co. P. C. cap.* 102. *p.* 227, 228.

If *A.* be indicted and plead *not guilty*, the jury appears, he challengeth ſix of the jury for cauſe, and the cauſes found inſufficient, and the ſix are ſworn, and the reſt of the jury challenged off, whereby the inqueſt remains *pro defectu juratorum*, a *tales* granted and the jury appear, the priſoner may challenge peremptorily any of the ſix, that were before challenged for cauſe, allowd, and ſworn 32 *H.* 6. 26. *b.* 14 *H.* 7. 19. *a.* for it is poſſible a new cauſe of challenge may intervene after the former ſwearing. 2 *R.* 3. 13. *a.* but if a man challenge him for cauſe, he muſt ſhew a cauſe happened after the former ſwearing.

But if the priſoner upon the firſt pannel had challenged for inſtance fifteen peremptorily, and then the jury remains for default of jurors, and a *diſtringas* with a forty *tales* is granted, he ſhall challenge peremptorily no more than will fill up his number, *viz.* in caſe of felony at this day five more, and in caſe of treaſon or petit treaſon twenty more to make up his full number of twenty peremptory challenges in the firſt caſe, and thirty-five in the laſt.

See 2 Hawk. P. C. ch. XLIII. of challenges. 4 Blackſ. Com. ch. 27. pa. 352, &c. &c. Burn. Tit. Jurors, ſect. iv. of the challenge of Jurors. Index to Foſter. Tit. challenge.

CHAP.

CHAP. XXXVI.

Concerning challenges for cauſe, *in caſe of indictments for treaſon or felony.*

CHALLENGES for cauſe upon indictments are of two kinds, either for the king, or for the priſoner, and each of theſe are again of two kinds, either to the array, or to the poll.

The king may challenge the array or the poll. 4 *H.* 7. 3. *b.* *Stat.* 33 *E.* 1. *Ordinatio de inquiſitionibus*, but then he muſt ſhew cauſe of challenge, but he need not ſhew the cauſe upon his challenge to the poll, till the whole pannel be peruſed. *Stamf. P. C. Lib.* III. *cap.* 7. *fol.* 162. *b.*

Challenges by the priſoner for cauſe ſhewn are of two kinds, *viz.* Either to the array or to the poll, but it is no principal challenge either to the array or poll, that the ſheriff or juror is of the king's livery, but he muſt conclude to the favour. 3 *H.* 6. *Challenge* 17.

If an alien be indicted or appealed of felony, tho the indictment ought to be by a grand inqueſt of *Engliſh*, yet by the ſtatute of 28 *E.* 3. *cap.* 13. the trial ſhall be *per medietatem linguæ*, *viz.* half the jury to be of aliens, except in caſe of felony by *Egyptians*, within the ſtatute of 1 & 2 *P.* & *M. cap.* 4.

And this ſtatute extends to felonies, as well made after the ſtatute of 28 *E.* 3. as before, for the ſtatute is general *all manner of inqueſts.*

And this ſtatute extended to trial of aliens indicted of treaſon alſo, and ſo the law ſtood till 1 & 2 *P.* & *M. cap.* 10. which reſtored the common-law trial in treaſon, and conſequently ouſted *medietas linguæ.* 1 *Mar. Dy.* 145. *a. Shirley's* caſe. *Co. P. C. p.* 27.

If upon an indictment of felony againſt an alien he plead *not guilty*, and a common jury be returned, if he doth not [272] ſurmiſe his being an alien before any of the jury ſworn, he hath loſt that advantage, *Dy.* 304. *a.* but if he alledge, that he is an alien, he may challenge the array for that cauſe, and thereupon a new precept or *venire facias* ſhall iſſue, or an award be made of a jury *de medietate linguæ.* 21 *H.* 7. 32. *b.* but it is more proper for him to ſurmiſe it upon his plea pleaded, and thereupon to pray it.

It ſeems, that upon indictments of treaſon or felonies, the priſoner pleading *not guilty* there ought at common law to be four hundreders returned: *vide Sat.* 33 *H.* 8. *cap.* 23. that ouſted challenge for ſhire or hundred in caſes of treaſon, but that ſtatute as to treaſon was altered by 1 *&* 2 *P. & M. cap.* 10.

But the ſtatute of 35 *H.* 8. *cap.* 6. requiring ſix hundreders, and that of 27 *Eliz. cap.* 6. requiring only two hundreders in perſonal actions extend not to trials upon indictments of treaſon or felony.

Yet I never knew any challenge for default of hundreders upon a trial of an indictment for felony or treaſon.

Challenges to the poll for cauſe are many, as in other caſes, which I ſhall not mention at large, becauſe they are all gathered up by my lord *Coke ſuper Lit.* §. 234. but ſhall only mention ſuch, as more ſpecially belong to capital cauſes.

By the ſtatute of 33 *H.* 8. *cap.* 12. for treaſon or felony committed in the king's houſe and tried before the lord ſteward all challenge except for malice is taken away. By the ſtatute of 25 *E.* 3. *cap.* 3. it is enacted, "That no indicter be put in inqueſt againſt the party "indicted, if he be challenged for that cauſe.

By the ſtatute of 2 *H.* 5. *cap.* 3. no man is to be admitted in any inqueſt upon the trial of the death of a man *(a)*, unleſs he have lands

(a) That is to ſay in capital cauſes: This ſtatute was introductive of a new law only with reſpect to the *quantum* of the freehold, for by the *common law* it was requiſite that a juror ſhould be a freeholder, ſo that, tho this ſtatute be repeald by the general words of 1 *&* 2 *P. & M. cap.* 10. as to treaſon, yet ſome freehold was ſtill neceſſary, and ſo it was allowd in *Fitzharris's* caſe by *Pemberton* C. J. See *Stat. Tr. Vol.* III. *p.* 263. notwithſtanding it was ruled otherwiſe in the caſe of lord *Ruſſel* by the ſame judge, *Stat. Tr. Vol.* III. *p.* 634. and in the caſe of Col. *Sydney*. *Ibid. p.* 736. which laſt reſolutions were declared to be illegal by ſeveral acts of parliament. See 1 *W. & M. Seſſ.* 2. *cap.* 2. 7 *W.* 3. *cap.* 3. See alſo Sir *John Hawles's* remarks on thoſe trials. *Stat. Tr. Vol.* IV. *p.* 169, *& p.* 189. By 4 *&* 5 *W. & M. cap.* 24. continued by 10 *Ann. cap.* 14. *&* 9 *Geo.* 1. *cap.* 8. 'tis not ſufficient, that a juror be a freeholder, but he muſt alſo have within the ſame county freehold or copyhold lands to the clear yearly value of ten pounds, and tho this ſtatute ſeems principally to regard counties at large, yet it hath been allowd to extend to trials in *London* for high treaſon. *Francia's* caſe, *Stat. Tr. Vol.* VI. *p.* 58. and *Layer's* caſe *Stat. Tr. Vol.* VI. *p.* 245. See the ſtatutes of 3 *Geo.* 2. *cap.* 25. *&* 4 *Geo.* 2. *cap.* 7. made perpetual by 6 *Geo. cap.* 37. whereby it is provided, "That all leaſeholders "upon leaſes for the term of 500 years or "more, or for 99 years, or any other term "determinable upon one or more lives of "an eſtate in poſſeſſion in land in their "own right of the yearly value of twenty "pounds or upwards over and above the "reſerved rent payable thereout, (or in "the county of *Middleſex* upon any leaſes, "where the improved rents or value a-"mount to fifty pounds or upwards *per* "*manum* over and above all ground rents "or other reſervations) may be ſummoned "or impannelled to ſerve on juries in like "manner as freeholders, *&c.* And that "the ſheriffs of *London* ſhall not impannel "or return any perſon to try any iſſue in "*King's-bench, Common Pleas*, and *Exche-*"*quer*, or to ſerve on any jury at the "ſeſſions of *oyer* and *terminer*, gaol deli-"very, or ſeſſions of the peace, but ſuch "who ſhall be an houſholder within the "ſaid city, and have real or perſonal eſ-

"tate

lands or tenements of the value of 40*s. per ann.* above all charges, if he be challenged: And by the conſtruction of this ſtatute, 1. It muſt be land of that value in the ſame county 9 *H.* 7. 1. *b.* Again 2. He muſt not only be ſeiſed thereof at the time of the pannel made, but alſo at the time that he comes to be ſworn, otherwiſe he may be challenged. 12 *H.* 7. 4. *a.*

And altho the ſtatute of 27 *Eliz. cap.* 6. hath raiſed it to 4*l. per annum*, yet that extends only to iſſues joined in the king's bench, common pleas, exchequer, and juſtices of aſſiſe, ſo that it reacheth not to trials of felons before juſtices of gaol-delivery, *oyer* and *terminer*, or of the peace, but theſe trials ſtand as they did by the ſtatute of 2 *H.* 5. as to the value of jurors, *vide ſtat.* 33 *H.* 8. *cap.* 23.

But yet by ſome ſubſequent ſtatutes the value of jurors freehold in caſes of trial of felony is changed.

By the ſtatute of 8 *H.* 6. *cap. ultimo* upon a trial *per medietatem linguæ* aliens need not have 40*s. per ann.* ſo *defectus annui cenſûs* is no challenge as to the aliens, but ſtill it remains a good challenge as to the other half of the jury, that are denizens. *Stamf. P. C. fol.* 160. *b.* [274]

By the ſtatute of 23 *H.* 8. *cap.* 13. upon trials of felony or murder in cities or boroughs a citizen or burgher worth 40*l.* perſonal eſtate may paſs, tho he have no freehold, but knights or eſquires living there are not within this proviſion.

The ſtatute of 33 *H.* 6. *cap.* 2. concerning indictments of perſons living in *Lancaſhire* refers not to trials.

By the ſtatute of 11 *H.* 6. *cap.* 1. a challenge is allowd of any perſon living in the ſtews of *Southwark*, tho he be of ſufficient freehold.

When a priſoner challengeth for cauſe he ought to ſhew his cauſe preſently *(b)* becauſe it is the king's ſuit, 1 *H.* 5. 10. *b.* 38 *Aſſiz.* 22. *(c)* but ſome books are, that he ſhall not ſhew cauſe till the pannel be peruſed 6 *R.* 2. *Challenge* 105. but he muſt ſhew all his cauſes together *per* 24 *Eliz. C. B. Bracket*'s caſe.

If in a trial upon an indictment of felony eleven be ſworn, and the twelfth challenged, whereby the inqueſt remains for default of jurors,

" tate to the value of one hundred pounds, " and that no perſon ſhall be impannelled " or returned to ſerve on any jury for the " trial of any capital offenſe, who ſhall " [illegible] to ſerve as a juror in civil " cauſes; and the ſame matter and cauſe " alleged by way of challenge and ſo " found ſhall be admitted as a principal " challenge, and the perſon ſo challenged " may be examined on oath as to the truth " of the ſaid matter.

(b) Mo. 846. *Luke* and *Clerk.*

(c) See *Challenge* 128.

and a *diſtringas* with a *tales* iſſue, and the jurors appear, ruled 1. The king ſhall not challenge any of the eleven ſworn, unleſs it be for a cauſe happened ſince their ſwearing; if it happen before, tho not known till after, it ſhall not be allowd. 2. That the eleven, that were laſt ſworn, ſhall not be now firſt ſworn, but they ſhall be called, as they happen in the pannel. *M.* 43 & 44 *Eliz. B. R. Wharton's* caſe, *Yelv.* 23.

And the ſame law is for the challenge of the priſoner for cauſe, but he may challenge them peremptorily notwithſtanding they were formerly ſworn, as before is ſhewn, *p.* 270.

Touching the trial of a challenge for cauſe made to the poll, *vide* *Co. Lit. p.* 158. *a.* If a juror be challenged before any jury [275] ſworn, two triers ſhall be appointed by the court, and if he be found indifferent and ſworn, he and the two triers ſhall try the next challenge, and if he be tried indifferent, then the two firſt triers ſhall be diſcharged, and the two jurors tried indifferent ſhall try the reſt.

If the plaintiff challenge ten and the priſoner one, then he that remains ſhall have added to him one choſen by the plaintiff, and another by the priſoner, and they three ſhall try the challenge. If ſix be ſworn, and the reſt challenged the court may aſſign any two of the ſix ſworn to try the challenges.

If the array be challenged, it lies in the diſcretion of the court how it ſhall be tried, ſometimes it is done by two attornies, ſometimes by the two coroners, and ſometimes by two of the jury with this difference, that if the challenge be for kindred in the ſheriff, it is moſt fit to be tried by two of the jurors returned; if the challenge found in favour of partiality, then by any other two aſſigned thereunto by the court. 29 *Eliz. C. B. Leſter's* caſe, *Trin.* 21 *Jac. B. R. Loyd* and *Williams (e)*.

But all this learning touching challenges to the poll, whether peremptory or for cauſe, is intended of trials by ordinary juries, not of trial by peers, for there no challenges is allowable, for they are not only triers of the fact but in ſome reſpects judges. *P.* 7 *Car.* 1. *Caſus comitis* Caſtle-haven *(f)*, but of this more hereafter.

2 Hawk. P. C. ch. 43. 4 Blackſ. Com. ch. 27. Burn. Tit. Jurors. Index to Foſter. Tit. Challenge.

(e) 2 *Rol. Rep.* 363. *(f)* *Stat. Tr. Vol.* I. *p.* 366.

CHAP.

CHAP. XXXVII.

Concerning evidence *and witneſſes.*

HAVING gone through thoſe things, that are previous and preparatory to the trial, I come now to conſider the trial itſelf by jury, and the things concomitant with it, and firſt concerning the evidence to be given to prove the priſoner guilty.

To give a full account of evidence of this kind there will be theſe things examinable. 1. The quality and qualifications of witneſſes. 2. The manner of their teſtimony, what upon oath, and what without oath. 3. Thoſe evidences and examinations, that are in writing, what, and when allowable, and what not. 4. The things teſtified, and therein of preſumptions and preſumptive evidences by the common law, and by acts of parliament. 5. What variance between the evidence and indictment maintains the indictment.

I. Concerning the quality and competency of witneſſes to be produced.

It is to be obſerved, that there be many circumſtances that diſable a juror or are ſufficient cauſes of exceptions or challenges of him, that are not allowable exceptions againſt a witneſs.

The exception of kindred is a good cauſe of challenge againſt a juror, but not againſt a witneſs, therefore the father may be a competent witneſs for or againſt his ſon, or *è converſo*, the maſter for his ſervant or *è converſo*. Theſe and the like exceptions may be to the credit or credibility of a witneſs, but are not exceptions againſt his competency.

For that I may obſerve it once for all, the exceptions to a witneſs are of two kinds. 1. Exceptions to the credit of the witneſs, which do not at all diſable him from being ſworn, but yet may blemiſh the credibility of his teſtimony, and in ſuch caſe the wineſs is to be allowd, but the credit of his teſtimony is left to the jury, [277] who are judges of the fact, and likewiſe of the probability or improbability, credibility or incredibility of the witneſs and his teſtmony, and theſe exceptions are of that great variety and multiplicity, that they cannot eaſily be reduced under rules or inſtances. 2. Exceptions to the competency of the witneſs, which do exclude him from giving

his teſtimony, and of theſe exceptions the court is the judge, and of theſe latter kind of exceptions I am here to treat.

If a perſon be outlawd in a perſonal action, it is a good cauſe of challenge againſt him as a juror, but yet he ſhall be ſworn as a witneſs notwithſtanding his outlawry. *Coke ſuper Lit.* §. 1. *fol.* 6. *b.*

The common incapacities or incompetencies of witneſſes are reckoned up by my lord *Coke ubi ſupra, viz.* 1. If he be attaint of giving a falſe verdict. 2. Or attaint of a conſpiracy at the king's ſuit, for then he is to have a villainous judgment and *amittere liberam legem*, otherwiſe it is if he be only attaint at the ſuit of the party: *vide* 24 *E.* 3. 73. *b.* 43 *E.* 3. 33. *b.* 4 *H.* 5. *Judgment* 220. 46 *Aſſiz.* 11. 27 *Aſſiz.* 59. 3. If he be convict of perjury. 4. Convict of a *præmunire.* 5. Convict of forgery upon the ſtatute of 5 *Eliz. cap.* 14. but [not] a conviction upon the ſtatute of 1 *H.* 5. *cap.* 3. 6. If he be convict of felony *(a)*. And therefore it ſhould ſeem, that an approver ſhall not be ſworn as a witneſs, if the appellee plead to the country, but only his general oath, that he taketh at the time of his becoming an approver, ſhall be taken, *quod tamen quære*, for this caſe differs from the teſtimony of a perſon convict, for the approver accuſeth himſelf as well as the appellee. 7. If by judgment he hath loſt his ears. 8. Or by judgment ſtood upon the pillory. 9. Or tumbrel. *Co. P. C.* 219. for they are thereby infamous. 10. Or been branded, *ſtigmaticus.* 11. Or being a champion in a writ of right becomes recreant or coward, for theſe render a perſon infamous, ſo that he loſeth *liberam legem.*

[278]

But yet in theſe exceptions theſe things are to be obſerved. 1. That he that allegeth this exception ought to ſhew forth a copy of the record atteſted or vouch the roll in court. 2. That if the king pardon theſe offenders, they are thereby rendered competent witneſſes, tho their credit is to be ſtill left to the jury, for the king's pardon takes away *pœnam & culpam in foro humano, M.* 12 *Jac. B. R. Cuddington & Wilkins (b)*: but yet it makes not the man always an honeſt man, and therefore he ſhall not be a juryman 11 *H.* 4. 41. but yet may be a witneſs againſt the opinion of my lord *Coke* in *Craſhaw's* caſe, *M.* 11 *Jac. B. R. Bulſtrode* 154. *quod vide.*

If a man be convict of felony, and prays his clergy, and is burnt in the hand, he is now a competent witneſs, for by the ſtatute of

(a) See *Dangerfield's* caſe in the trial of lord *Caſtlemain, Stat. Tr. Vol.* III. *p.* 42. *Raym.* 379. and the trial of *Eliz. Cellier, Stat. Tr. Vol.* III. *p.* 35. *Raym.* 369.

(b) *Hob.* 67 & 89.

18 *Eliz. cap.* 7. it countervails a purgation and a pardon, and he is thereby enabled afterwards to acquire goods. *Hob.* 288. *Searle* and *Williams.*

And ſo it is if he be in orders, whereby burning in the hand is diſcharged by the ſtatute of 4 *H.* 7. *cap.* 13. *Hob. ubi ſupra.*

And ſo it is if the burning in the hand be pardoned, *Hob. ibid.* or if he prays his clergy, tho the court do reſpit his reading, *quære, vide Holcroft's* caſe, 4 *Co. Rep.* 46. *a.*

There are certain other matters, that render a man incompetent to be a witneſs, tho they are not ſuch as render him infamous by judgment or award in any of the king's courts.

1. Some are diſabled in regard of defect of intellectuals: A perſon of *non ſane memory* cannot be a witneſs, while he is under that inſanity, but if he have *lucida intervalla,* then during the time he hath underſtanding he may be a witneſs. *Co. Lit. ubi ſupra.* But it is a difficulty ſcarcely to be cleared, what is the *minimum, quod ſic* diſables the party.

If an infant be of the age of fourteen years, he is as to this purpoſe of the age of diſcretion to be ſworn as a witneſs, but if under that age, yet if it appear that he hath a competent diſcretion, he may be ſworn.

But in many caſes an infant of tender years may be examined without oath, where the exigence of the caſe requires it, as in caſe of rape, buggery, witchcraft, *de quibus vide quæ ſupra, Part* I. *cap.* 24. *p.* 302. *& cap.* 58. *p.* 634. *& infra, p.* 283. [279]

2. It is ſaid by my lord *Coke ubi ſupra,* that an infidel is not to be admitted as a witneſs, the conſequence whereof would alſo be, that a *Jew,* (who only owns the old teſtament) could not be a witneſs.

But I take it, that altho the regular oath, as it is allowd by the laws of *England,* is *tactis ſacroſanctis Dei evangeliis,* which ſuppoſeth a man to be a chriſtian, yet in caſes of neceſſity, as in foreign contracts between merchant and merchant, which are many times tranſacted by *Jewiſh* brokers, the teſtimony of a *Jew tacto libro legis Moſaicæ* is not to be rejected, and is uſed, as I have been informed, among all nations.

Yea, the oaths of idolatrous infidels have been admitted in the municipal laws of many kingdoms, eſpecially *ſi juraverit per verum Deum creatorem,* and ſpecial laws are inſtituted in *Spain* touching the form

form of the oaths of infidels. *Vide Covarruviam, Tom.* I. *part* 1. *de juramenti forma (c).*

And it were a very hard caſe, if a murder committed here in *England* in preſence only of a *Turk* or a *Jew*, that owns not the chriſtian religion, ſhould be diſpuniſhable, becauſe ſuch an oath ſhould not be taken, which the witneſs holds binding, and cannot ſwear otherwiſe, and poſſibly might think himſelf under no obligation, if ſworn according to the uſual ſtyle of the courts of *England.*

But then it muſt be agreed, that the credit of ſuch a teſtimony muſt be left to the jury.

3. Some regularly are diſabled in reſpect of the civil unity of their perſons, as the huſband regularly is not allowed to be a witneſs for or againſt the wife, or *è converſo*; but *vide* touching this alſo at large *Part* I. *cap.* 24. *in fine & ibid. cap.* 64. *p.* 693. *ſuper ſtatut.* 1. *Jac. cap.* 11.

4. Some are diſabled to be witneſſes in reſpect, that they are concerned in intereſt.

[280] And therefore a party to an uſurious contract, if the money be unpaid, ſhall not be received as a witneſs to prove the uſury, becauſe he avoids thereby his own ſecurity, but otherwiſe it is, if the money be already paid, and the ſecurity taken up, for then he is allowable to be a witneſs for the king *(d).*

A. wounds *B.* for which he is indicted, yet *B.* may be a witneſs for the king: but this ſhall be no evidence in an action brought by *B.* for the aſſault, tho *A.* be convict at the king's ſuit.

If a reward be promiſed to a perſon for giving his evidence before he gives it, this, if proved, diſables his teſtimony.

And ſo for my own part I have always thought, that if a perſon have a promiſe of a pardon, if he gives evidence againſt one of his own confederates, this diſables his teſtimony if it be proved upon him *(e).*

Yet in ſome caſes a conſequential benefit to the witneſs doth not diſable his teſtimony, tho it may abate the credit of his teſtimony.

A. B. and *C.* are ſeverally indicted for perjury in proving a bond, *A.* traverſeth the indictment, *B.* and *C.* tho indicted for the ſame

(c) *P.* 249. *Edit. Antwerp.* 1614.
(d) *Co. Lit.* 6. *b.*
(e) However the contrary opinion hath prevailed, ſee *Tong*'s caſe, *Kel.* 13. and *Layer*'s caſe *Stat. Tr. Vol.* 6. *p.* 257. but moſt certainly it is a great objection to the credibility, if not to the competency of the witneſs, *vide ſupra, Part* 1. *p.* 304.

offenſe,

offenſe, yet not being convicted may be witneſſes for *A.* to prove the bond ſealed. *P.* 19 *Car* 1. *B. R. Rot.* 2. adjudged in the caſe of *Billmore*, *Gray*, and *Harbin*, and accordingly ruled *P.* 40 *Eliz. C. B. Gunſton* and *Downs (f)* in three actions ſeverally brought againſt three perſons for perjury in *Chancery* in one and the ſame point, for the other two are not immediately concerned in this trial, tho conſequentially they are concerned, the point being the ſame.

If *A.* bring an action upon the ſtatute of *Winton* againſt the hundred, none that live or have land in the hundred ſhall be admitted to give evidence for the hundred. *M.* 1650. *Bennet* verſus *Hundred de Hertford (g)*.

Yet if a perſon be taken and indicted for the robbery, they of the hundred may be admitted to prove the defendant guilty of the robbery, and that he was taken upon their purſuit, tho this doth conſequentially diſcharge the hundred upon the *ſtatute* of *Winton*, & 27 *Eliz. cap.* 13. [281]

A. brings an action againſt *B.* wherein *C.* is produced as a witneſs for *A.* and *A.* recovers upon his teſtimony, *C.* is thereupon indicted of perjury *contra formam ſtatuti* (*) *ad grave dampnum ipſius* B. *C.* pleads *not guilty*, ruled that *B.* ſhall not be received to give evidence againſt *C.* becauſe he is the party grieved, and ſhall recover 20*l.* *M.* 1650. *B. R. Bacon*'s caſe, 2 *Rol. Abr.* 685. *pl.* 4. and yet it ſeems he ſhall not recover the 20*l.* upon the indictment, but muſt bring his action upon the ſtatute; and yet conſtant experience, and the very ſtatute of 21 *H.* 8. *cap.* 11. that gives reſtitution of goods to the party proſecuting an indictment of felony makes it evident, that he may be, and indeed ought to be the witneſs to convict the felon, tho thereupon he is to have reſtitution of the goods ſtolen.

If the tenant robs his lord, or the leſſee for life the reverſioner, or a reſiant the lord of the franchiſe that hath *bona felonúm*, theſe may be witneſſes upon an indictment or trial of the felon, notwithſtanding the conſequential advantage that accrueth by the attainder or conviction of the party, yet the credibility of their teſtimony is to be left to the jury. But if *A.* hath a promiſe or grant of the goods of *B.* arreſted of felony in caſe he be convict, I ſhould never allow *A.* to be a witneſs

(*f*) 2 *R. A.* 685. *pl.* 3.

(*g*) 2 *R. A.* 685. *pl.* 6. *Styl.* 233. but this is now alterd by 8 *Geo* 2. *cap.* 16. for by that ſtatute, "Any perſon inhabiting "within the hundred or any franchiſe "thereof ſhall be admitted as a witneſs on "behalf of the hundred in the ſame man-"ner, as if he were not an inhabitant of "that hundred, but reſided in any other "hundred whatſoever.

(*) *Vix.* 5 *Eliz. cap.* 9.

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to convict *B.* for he by his own act after the felony committed acquires the intereſt, and ſo acts and ſwears for his own advantage.

A. brings an appeal againſt *B.* for the death of *C.* his father or her huſband, *A.* cannot be a witneſs againſt *B.* upon *not guilty* pleaded, becauſe it is his or her own ſuit.

[282] But if *A.* be nonſuit upon the appeal, and ſo the priſoner is arraigned upon the appeal at the king's ſuit, now *A.* may be a witneſs, becauſe now the proſecution is merely for the king.

If a man be indicted of high treaſon, the king cannot by his great ſeal or *ore tenus* give evidence, that he is guilty, for then he ſhould give evidence in his own cauſe; *vide ſupra, cap.* 28. *p.* 21[illegible]. & *Part* I. *cap.* 26. *p.* 344. the caſe of the earl of *Lancaſter.*

Nay, altho he may in perſon ſit on the king's bench, yet he cannot pronounce judgment in caſe of treaſon, but it is performed by the *ſenior* judge, for as he cannot be a witneſs, ſo he cannot be a judge *in propriâ cauſâ.*

And the ſame law is for felony for the ſame reaſon; yet in ſome caſes the king's teſtimony under his great ſeal is allowable, as in an eſſoin *de ſervitio regis*, the warrant under the great ſeal *(h)* is a good teſtimonial of it. *F. N. B.* 17. *Stat. Glouc. cap.* 8.

Now as touching the compulſory means to bring in witneſſes they are of two kinds. 1. By proceſs of *ſubpœna* iſſued in the king's name by the juſtices of peace, *oyer* and *terminer*, gaol-delivery, or king's bench, where the plea of *not guilty* is to be tried. 2. Which is the more ordinary and more effectual means, the juſtices or coroner that take the examination of the perſon accuſed, and the information of the witneſſes, may at that time, or at any time after, and before the trial bind over the witneſſes to appear at the ſeſſions, and in caſe of their refuſal either to come or to be bound over, may commit them for their contempt in ſuch refuſal, and this is virtually included within their commiſſion and by neceſſary conſequences upon the ſtatute of 1 & 2 *P.* & *M. cap.* 13. whereof before, *p.* 52.

But that which is a great defect in this part of judicial adminiſtration, is, that there is no power to allow witneſſes their charges, whereby many times poor perſons grow weary of attendance, or bear their own charges therein to their great hindrance and loſs. (*)

II. As

(h) But not under the privy-ſeal. 2 *Co. Inſt.* 314. *ſuper ſtat. Glouceſter.*

(*) On conviction, in general, for any felony, the reaſonable expences of proſecution

II. As to the ſecond matter in what manner the evidence is to be given.

Regularly the evidence for the priſoner in caſes capital is given without oath, tho the reaſon thereof is not manifeſt, *(i)* but [otherwiſe it is] in all caſes not capital, tho it be miſpriſion of treaſon: neither is counſel allowed him *(k)* to give evidence to the fact, nor in any caſe, unleſs matter of law doth ariſe. 1 *H.* 7. 23. *Co. P, C. p.* 137.

But in ſome ſpecial felonies by act of parliament the priſoner's witneſſes in caſes capital ſhall be examined upon oath at his trial, namely the ſtatute of 31 *Eliz. cap.* 4. againſt imbezzelling of the king's ordnance, giving liberty to the priſoner to make lawful proof by witneſs or otherwiſe, ſeems virtually to allow the priſoner's teſtimony upon oath. *Co. P. C. cap.* 22. *p.* 79.

And the ſtatute of 4 *Jac. cap.* 1. touching felonies upon the borders, *&c.* gives examination of the priſoner's witneſſes upon oath.

If a witneſs be produced and ſworn for the king, yet if that witneſs alledge any matter in his evidence, that is for the priſoner's advantage, (as many times they do,) that ſtands as a teſtimony upon oath for the priſoner, as well as for the king.

Regularly the king's evidence is given upon oath againſt the priſoner, and ought not to be admitted otherwiſe than upon oath; nay, inſtances have been given of very young witneſſes ſworn upon evidence in capital cauſes, *viz.* one of nine years old. *Dalton's Juſtice, cap.* 111. *p.* 297. *(l)* [284]

Yet ſuch very young people under twelve years old I have not known examined upon oath, but ſometimes the court for their infor-

cution are by *ſtat.* 25 *Geo.* 2. *c.* 36. to be allowed to the proſecutor out of the county ſtock, if he petitions the judge for that purpoſe; and by *ſtat* 27 *Geo.* 2. *c.* 3. poor perſons, bound over to give evidence, are likewiſe intitled to be paid their charges, as well without conviction as with it.

(i) Nay, it is manifeſtly againſt all reaſon, that the priſoner ſhould not be allow'd the ſame liberty to make out his innocence, as is allowed to prove his guilt, and tho it has been an uſual practice not to ſuffer witneſſes for the priſoner in capital caſes to be examined upon oath, yet as lord *Coke* obſerves *P. C. p.* 79. there is not ſo much as *ſcintilla juris* for it, it being unſupported by any act of parliament, antient author, book caſe, or record: See Sir *John Hawles's* remarks on *College's* trial. *State Tr. Vol.* IV. *p.* 178. To remedy this inconvenience it was provided by 7 *W. cap.* 3. "That every perſon indicted for high treaſon, "whereby corruption of blood may be "made, ſhall be admitted to make his de"fenſe by witneſſes on oath," but this ſtatute being defective it is further provided by 1 *Ann cap.* 9. "That the witneſſes for "the priſoner in any trial for treaſon or fe"lony ſhall give their evidence upon oath "in like manner, as the witneſſes for the "crown, and if convicted of perjury ſhall "be ſubject to the ſame penalties, forfei"tures, *&c.*

(k) Upon an indictment, but it is otherwiſe in an appeal. *Corone* 31. 9 *E.* 4. 2. *a.* 1 *H.* 7. 26. *a.*

(l) N. Edit. cap. 164. *p.* 541.

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mation have heard their teſtimony without oath, which poſſibly being fortified with concurrent evidences may be of ſome weight, as in caſes of rape, buggery, witchcraft, and ſuch crimes, which are practiſed upon children: *vide ſupra, Part* I. *cap.* 24. *p.* 302 *& cap.* 58. *p.* 634. *& ſupra, p.* 279.

2 Hawk. P. C. ch. XLVI. of evidence per tot. Burn. tit. evidence. 4. Blacks. Com. ch. 27. pa. 356, 360. See Index to Foſter. tit. Evidence. Overt-acts. Witneſſes. 2. Wilſon 28. ſeems Contra'. 1. Wilſon, 84. 1. Atk. 21.

CHAP. XXXVIII.

Concerning evidence in writing.

BY the ſtatute of 1 *&* 2 *P. & M. cap.* 13. and 2 *&* 3 *P. & M. cap.* 10. Juſtices of peace and coroners have power to take examinations of the party accuſed, and informations of the accuſers and witneſſes, (the examinations to be without oath, the informations to be upon oath,) and are to put the ſame in writing, and are to certify the ſame to the next gaol-delivery.

Theſe examinations and informations thus taken and returned may be read in evidence againſt the priſoner, if the informer be dead, or ſo ſick, that he is not able to travel, and oath thereof made; otherwiſe not.

But then, 1. Oath muſt be made either by the juſtice or coroner, that took them, or the clerk that wrote them, that they are the true ſubſtance of what the informer gave in upon oath, and what the priſoner confeſſed upon his examination. 2. As to the examination of the priſoner, it muſt be teſtified, that he did it freely without any menace, or undue terror impoſed upon him; for I have often known the priſoner diſown his confeſſion upon his examination, and hath [285] ſometimes been acquitted againſt ſuch his confeſſion; and the reaſon why theſe examinations and informations are allowable in evidence (under the cautions above premiſed,) is, becauſe they are judges of record, and the informations before them upon oath are authoriſed and required by act of parliament, and they are judges of the crimes upon which the informations are taken.

Welſh forceably took away Mrs. *Puckring* and married her, and thereupon a temporary act of parliament was obtained, enabling commiſſioners

miſſioners therein named to hear and determine that marriage, and to diſſolve it, if there were cauſe: In that cauſe Mrs. *Puckring* herſelf was examined touching the manner of the marriage, as a ſupplemental proof, and died hanging the ſuit, *Welſh* was after indicted upon the ſtatute of 3 *H.* 7. for this fact for felony, and it was moved, that this examination of Mrs. *Puckring* might be read in evidence againſt the priſoner, but it was denied. 1. Becauſe it was a proceeding according to the civil law in a civil cauſe. 2. Becauſe that ſuit was originally at the inſtance of Mrs. *Puckring* and her own cauſe, and tho ſhe be according to the civil law examinable, as a ſupplemental proof, yet it was a cauſe for her own intereſt, and therefore at common law not allowable, tho the commiſſioners that took the examination were judges conſtituted by that which then was allowed to be an act of parliament. *M.* 1652. *B. R.*

A. commits a felony in the county of *B.* and flies into the county of *C.* and there is taken and brought before a juſtice of peace of the county of *C.* where *A.* is examined, and informations upon oath taken by that juſtice, tho the juſtice of peace of the county of *C.* had not an original cogniſance of a felony committed in the county of *B.* yet theſe examinations and informations being tranſmitted into the county of *B.* where *A.* is indicted, may be read in evidence againſt him. *Dalt. Juſt. cap.* 111. *p.* 299. for tho he hath not an original juriſdiction of the cauſe, yet he hath a conſequential juriſdiction thereof, having the party before him, and it is in order to the preſervation of the peace.

If a juſtice of peace takes information in a caſe of high treaſon, it ſeems theſe cannot be read in evidence upon an indictment of treaſon, becauſe high treaſon is not within that commiſſion, but it is of uſe only, as an information upon oath, which they may take, tho they cannot proceed upon it, for all treaſon is a breach of the peace; *quære tamen*, if it be not allowable to be given in evidence. [286]

See Burn. Tit. Evidence, Sect. II. of written evidence.

CHAP.

CHAP. XXXIX.

Concerning evidences *requiſite, or allowed* by acts of parliament, *and* preſumptive evidence.

BY the ſtatutes of 1 *E.* 6. *cap.* 12. 5 *E.* 6. *cap.* 12. there ought to be two witneſſes to an indictment of high treaſon, and theſe witneſſes are to be ſworn before the jury alſo upon his trial, unleſs he willingly without violence confeſs the ſame.

Theſe two witneſſes are ſtill required upon his indictment, and it is not altered by the ſtatute of 1 & 2 *P.* & *M. cap.* 10. which reſtores the common law trial, but extends not to the indictment. *Co. P. C. cap.* 2. *p.* 25. *vide ſupra, Part* I. *p.* 298.

A confeſſion upon examination before a competent judge before indictment is ſuch a confeſſion, as the ſtatute allows. *Co. P. C. ubi ſupra*, and ſo it was agreed in the caſe of *Tonge* and others, 14 *Car.* 2. *(a)*

If one witneſs be poſitive, and the other witneſs is only by hearſay, theſe are not two lawful accuſers within the ſtatute, agreed by all the [287] juſtices in the lord *Lumley*'s caſe *Hill.* 14 *Eliz.* cited *Co. P. C. ubi ſupra* againſt the opinion in *Dy.* 99. *b. Thomas*'s caſe; but two witneſſes are not requiſite either upon the indictment or trial of treaſons for counterfeiting money by the expreſs proviſio of the ſtatute of 1 & 2 *P.* & *M. cap.* 11. which directs, that in all treaſons for counterfeiting or impairing of coin the offenders ſhall be indicted, arraigned, tried, convicted and attaint by ſuch evidence, and in ſuch manner as was uſed before. 1 *E.* 6.

The words of the ſtatute 5 & 6 *E.* 6. *cap.* 11. are, "That no "perſon ſhall be indicted, convicted, or attaint for any the treaſons "aforeſaid, or for any other treaſons, that now be, *or hereafter ſhall* "*be*, which ſhall hereafter be perpetrated, committed or done, unleſs "the ſame offender be thereof accuſed by two lawful accuſers, *&c.*" It may be conſiderable, whether this act extends to treaſons *de novo* made by act of parliament after 5 & 6 *E.* 6. *(b)*

If ſuch new treaſons be enacted after, as that of 5 *Eliz. cap.* 11. and 18 *Eliz. cap.* 1. concerning clipping and waſhing of coin, and alſo 1 *Mar. cap.* 6. which have this expreſſion *(being thereof lawfully con-*

(a) Kel. 18. *vide Part* I. *p.* 304. *(b)* See *Kel.* 9, 10, 49. *vide Part* I. *p.* 297.

vict

vict or attaint, according to the due order and courſe of the laws of this realm ſhall ſuffer death, &c.) there ſeems to be no neceſſity of two witneſſes upon the indictment or trial. 1. Becauſe, *according to the due order and courſe of the laws* ſeems to intend common law *(c)*. 2. But if there were doubt of that, yet in theſe acts concerning coin the ſtatute of 1 & 2 *P. & M. cap.* 11. enacts, "That all offenſes con-"cerning counterfeiting, forging, or impairing any coin current "within the realm, ſhall be indicted, arraigned, tried, convict and "attaint by ſuch evidence, and in ſuch manner,, as hath been uſed "before the firſt year of *E.* 6." therefore, if the ſtatute of *E.* 6. ſhould be conſtrued to refer to any future ſtatute making treaſon, there will be the ſame reaſon to carry over the ſtatute of 1 & 2 *P. & M. cap.* 11. to the treaſons enacted againſt impairing of coin by 5 & 18 *Eliz.*

But yet, as to other treaſons, it may be very queſtionable, whether 5 & 6 *E.* 6. doth as to this point extend to treaſons [288] newly enacted after, 1. Becauſe tho a former act may direct the proceedings upon a new offenſe made after, (as the ſtatutes of 18 *Eliz. cap.* 5. 31 *Eliz. cap.* 5. concerning informers, 21 *Jac. cap.* 4. concerning ſuing informations in the proper county, and pleading the general iſſue,) yet this doth not *in terminis* extend to offenſes to be committed againſt ſtatutes to be made, but only in all other treaſons hereafter to be committed *(d)*. 2. Becauſe moſt commonly in the acts, that after 5 & 6 *E.* 6. enacted new treaſons, if the parliament intended two lawful witneſſes, it moſt commonly expreſſeth it accordingly; *quære*, for 1 & 2 *P. & M. cap.* 11. ſeems to import, that in new treaſons concerning counterfeiting foreign coin made current by proclamation, there would have been a neceſſity of two witneſſes by the ſtatute of 5 & 6 *E.* 6. and therefore provides againſt it.

By the ſtatute of 21 *Jac. cap.* 27. the mother of a baſtard child concealing it's death ſhall ſuffer as in murder, unleſs ſhe prove by one witneſs, that the child was born dead; this ſtatute ſtands yet continued

(c) I cannot ſee why theſe general words ſhould be confined only to the *common law*, ſince *the laws* in the plural number do as fully expreſs, and ſeem moſt naturally to include all the laws of the land, whether *common* or *ſtatute*.

(d) The ſtatute of 5 & 6 *E.* 6. ſeems *expreſly & in terminis* to extend to treaſons, which ſhould be afterwards enacted; what elſe can be the meaning of the words, *any other treaſons, that now be, or hereafter ſhall be?* for theſe words cannot reaſonably be intended only of offenſes hereafter to be committed, becauſe that is provided for by the other words immediately following, *which ſhall hereafter be perpetrated, committed or done:* but to obviate all doubts, it is ſince provided by 7 *W.* 3. *cap.* 3. "That "in all caſes of high treaſon, whereby any "corruption of blood ſhall enſue, no per-"ſon ſhall be indicted, tried or attainted, "but upon the oaths of two lawful wit-"neſſes.

among many others by a clauſe in the latter end of the act for relief of the northern army. 16 *Car.* 1. *cap.* 4. (*) until by parliament it be otherwiſe enacted.

The indictment to put the priſoner to this proof by one witneſs, that the child was dead born, muſt contain this ſpecial matter, that the priſoner was delivered of a child, which by the laws of the kingdom was a baſtard, and that it was born alive, and ſhew how ſhe killed it.

[289] But the indictment need not allege, that ſhe concealed it, but it muſt be proved upon evidence, *(d)* if advantage be taken of this ſtatute againſt her.

The indictment doth not conclude *contra formam ſtatuti*, for the ſtatute only directs the evidence, where the caſe is within it, but created not a new crime. *(e)*

If there be no concealment proved, yet it is left to the jury to inquire, whether ſhe murdered it or not, by thoſe circumſtances that occur in the caſe, as if it be wounded or hurt, *&c.* but it doth not put her upon an abſolute neceſſity of proving it born alive by one witneſs, and ſo the evidence ſtands but as at common law.

If upon the view of the child it be teſtified by one witneſs by apparent probabilities, that the child was not come to it's *debitum partûs tempus*, as if it have no hair or nails, or other circumſtances, this I have always taken to be a proof by one witneſs, that the child was born dead, ſo as to leave it nevertheleſs to the jury, as upon a common law evidence, whether ſhe were guilty of the death of it or not.

In ſome caſes preſumptive evidences go far to prove a perſon guilty, tho there be no expreſs proof of the fact to be committed by him, but then it muſt be very warily preſſed, for it is better five guilty perſons ſhould eſcape unpuniſhed, than one innocent perſon ſhould die.

If a horſe be ſtolen from *A.* and the ſame day *B.* be found upon him, it is a ſtrong preſumption that *B.* ſtole him, yet I do remember before a very learned and wary judge in ſuch an inſtance *B.* was condemned and executed at Oxford aſſiſes, and yet within two aſſiſes after *C.* being apprehended for another robbery and convicted, upon his judgment and execution, confeſſed he was the man that ſtole the horſe, and being cloſely purſued deſired B. a ſtranger to walk his horſe for him, while he turned aſide upon a neceſſary occaſion and eſcaped; and *B.* was apprehended with the horſe, and died innocently.

(*) *Vide* 3 *Car.* 1. *cap.* 5. §. 22. *in fine.*

(*d*) If no intent to conceal, it is not murder within the ſtatute, tho no body were preſent at the time of the delivery. *Kele* 33.

(*e*) See *Ann Davis*'s caſe, *Kel.* 32.

I would

I would never convict any perſon for ſtealing the goods *cujuſdam ignoti* merely becauſe he would not give an account how he came by them, unleſs there were due proof made, that a felony was committed of theſe goods.

I would never convict any perſon of murder or manſlaughter, unleſs the fact were proved to be done, or at leaſt the body found dead *(f)*, for the ſake of two caſes, one mentioned in my lord *Coke's P. C. cap.* 104. *p.* 232. a *Warwickſhire* caſe *(g)*.

Another that happened in my remembrance in *Staffordſhire*, where *A.* was long miſſing, and upon ſtrong preſumptions *B.* was ſuppoſed to have murdered him, and to have conſumed him to aſhes in an oven, that he ſhould not be found, whereupon *B.* was indicted of murder, and convict and executed, and within one year after *A.* returned, being indeed ſent beyond ſea by *B.* againſt his will, and ſo, tho *B.* juſtly deſerved death, yet he was really not guilty of that offenſe, for which he ſuffered.

But of all difficulties in evidence there are two ſorts of crimes, that give the greateſt difficulty, namely rapes and witchcraft, wherein many times perſons are really guily, yet ſuch an evidence, as is ſatisfactory to prove it, can hardly be found; and on the other ſide perſons really innocent may be entangled under ſuch preſumptions, that many times carry great probabilities of guilt. *Tutius ſemper eſt errare in acquietando quàm in puniendo, ex parte miſericordiæ, quàm ex parte juſtitiæ.*

See 2 Hawk. P. C. ch. 46. ſect. 42, 43.

(f) This was alſo a rule in the civil law. *Dig. Lib.* XXIX. *Tit.* 5. §. 24.

(g) That caſe was thus, An uncle, who had the bringing up of his niece, to whom he was heir at law, correcting her for ſome offence, ſhe was heard to ſay, *Good uncle do not kill me*; after which time the child could not be found, whereupon the uncle was committed upon ſuſpicion of murder, and admoniſhed by the juſtices of aſſiſe to find out the child by the next aſſiſes, againſt which time he could not find her, but brought another child as like her in perſon and years as he could find and apparelled her like the true child, but on examination ſhe was found not to be the true child; upon theſe preſumptions he was found guilty and executed; but the truth was, the child being beaten ran away, and was received by a ſtranger, and afterwards, when ſhe came of age to have her land, came and demanded it, and was directly proved to be the true child.

CHAP. XL.

Concerning variance *between the* indictment *and* evidence, *and where the* evidence proves the indictment, *and where not.*

IF *A.* be indicted, that the firſt of *July* 21 *Car.* 2. he robbed or murderd *B.* and upon evidence it appears, that it was committed another day, or another year, either after or before the time laid in the indictment, yet this proves the iſſue for the king; only it is requiſite, if there be an eſcheat in the caſe, and that the felony were committed after the day laid in the indictment, for the jury to find the day, becauſe the relation of the eſcheat to avoid meſne grants and incumbrances relates to the time of the felony committed 32 *Eliz. per omnes juſtic' Co. P. C. cap.* 104. *p.* 230.

If *A.* be indicted for a robbery or murder *apud* A. *in com'* B. if it were committed in another county, regularly he ought to be found *not guilty*, becauſe regularly an offenſe of that nature in one county is not preſentable out of the county where it was done, but tho it were done in another vill in the county of *B.* yet he is to be found guilty, for the vill is not material.

If the evidence in murder differ from the indictment *in ſpecie mortis*, as if the indictment were for killing by poiſon, and the evidence be of killing by ſtabbing, it doth not maintain the indictment. 9 *Co. Rep.* 67. *a. Mackally's* caſe.

But if the indictment were for poiſoning with one kind of poiſon, and the proof be of another kind of poiſon, or the indictment be for killing with a ſword, and the evidence be of killing with a ſtaff, or with a gun, it maintains the indictment, for the common effectual word in both is *percuſſit: vide* 9 *Co. Rep.* 67. *a. Mackally's* caſe, *Co. P. C. cap.* 62. *p.* 135. Sir *Thomas Overbury's* caſe. *(a)*

[292] And the ſame law holds in relation to the acceſſaries to ſuch principals, and with the ſame difference.

If *A. B.* and *C.* be indicted for the murder of *D.* and it is laid in the indictment, that *A.* gave him the ſtroke, whereof he died, and that *B.* and *C.* were *præſentes, auxiliantes & abettantes*, tho upon the evidence it appears, that *B.* alone gave the ſtroke, whereof he died,

(a) *Stat. Tr. Vol.* I. *p.* 118.

and

and *A.* and *C.* were *præſentes, auxiliantes & abettantes*, it maintains the indictment, for they are all principals, *Mackally*'s caſe, *ubi ſupra. (b)*

If *A.* and *B.* be indicted of the murder of *C.* and upon the evidence it appears, that *A.* committed the fact, and *B.* was not preſent, but was acceſſary before the fact by commanding it, *B.* ſhall be diſcharged. 26 *H.* 8. 5.

If *A.* and *B.* be indicted as principal, and *C.* is indicted as acceſſary to both after the fact done, *A.* and *B.* are convicted, or only *A.* is convicted, and upon the evidence againſt *C.* it appears he was acceſſary only to *A.* it maintains the indictment. 9 *Co. Rep.* 119. *a.* lord *Sanchar*'s caſe *per curiam. (c)*

A. is indicted for murdering *B. ex malitiâ præcogitatâ*, evidence of malice in law, as killing an officer or watchman in the execution of his office, or killing a man without any provocation maintains the indictment, becauſe the law interprets it malice. 4 *Co. Rep.* 67. *b.*

A. is ſpecially indicted upon the ſtatute of 1 *Jac. cap.* 8. for ſtabbing *B.* not having a weapon drawn, nor ſtricken firſt, *contra formam ſtatuti*, upon the evidence it appears, that the perſon kild ſtruck firſt, yet it is good evidence to convict *A.* for manſlaughter. *H.* 23 *Car.* 1. *Harwood*'s caſe. *(d)*

So if *A.* be indicted for petit treaſon for killing his maſter *felonicè, proditoriè, & ex malitiâ ſuâ præcogitatâ*, tho he were not his maſter, he may be found guilty of murder, *(e)* and tho it were not *ex malitiâ præcogitatâ*, he may be found guilty of manſlaughter, and not guilty as to the petit treaſon; and ſo I have known it ruled oftentimes.

So if a man be indicted of burglary, and *quòd felonicè & burglariter cepit bona, &c.* he may be acquit of the burglary, [293] and found guilty of ſimple felony, if the evidence riſeth no higher.

So if a man be indicted of murder *ex malitiâ præcogitatâ*, an evidence proving the killing upon a ſudden falling out is a good evidence to prove him guilty of manſlaughter, and the jury ought accordingly to find it. *Plow. Com.* 101. *a. Co. Lit.* 282. *a.* And ſo in an appeal.

2 Hawk. P. C. ch. 46. ſect. 36, 37, 38, &c. &c.

(b) See 1 *Salk*, 334. *Wallis*'s caſe.
(c) Vide Part I. *p.* 624.
(d) Style 86.
(e) Vide Part I. *p.* 378. *& poſtea, cap.* 46. *ſub fine.*

CHAP. XLI.

Concerning the demeanor of the jury, *and* how their verdict *is to be given.*

AFTER the arraignment of the priſoners, and their pleas of *not guilty* received and recorded, the ſheriff returns the pannel of the jury, the priſoners are again called to the bar, and the jury being called, and appearing the priſoners are told by the clerk, that theſe good men now called and appearing are to paſs upon their lives and deaths; therefore, if they will challenge any of them, they are to do it before they are ſworn.

If no challenge hinder, the jury are commanded to look on the priſoners, and then ſeverally twelve of them, neither more nor leſs, are ſworn, *You ſhall well and truly try, and true deliverance make between our ſovereign lord the king and the priſoners at the bar, whom you ſhall have in charge, [and true verdict give] according to your evidence. So help you God.*

After the jury ſworn proclamation is to be made, "That if any "can inform for our lord the king againſt the priſoners at the bar, "let them come forth and they ſhall be heard;" then the priſoners
[294] are called ſucceſſively to the bar, firſt *A.* and he is commanded to hold up his hand, the indictment is repeated, "To this he hath pleaded *not guilty*, the iſſue is to try, whether he "be guilty or not guilty; if you find him *guilty*, you ſhall ſay ſo, "and inquire what goods or chattels, lands or tenements he had at "the time of the felony or treaſon committed, or at any time after. "And if you find him *not guilty*, you ſhall inquire, whether he did "fly for it, and if you find, that he fled for it, you ſhall inquire of "his goods and chattels, and if you find him *not guilty*, and that he "did not fly for it, you ſhall ſo and no more. Hear your evidence."

I have ſet down the clerk's charge to the jury, becauſe it contains the effect of their inquiry.

Tho there be twenty priſoners at the bar for ſeveral felonies, and the oath is general to try between the king and the priſoners at the bar, yet the jury is to inquire of no more than what they are particularly charged with, as before; and therefore, tho twenty have pleaded,

ed, and ſtand at the bar when the jury is ſworn, yet the court may ſtay at any number of the priſoners, and ſo the jury ſtand charged with no more than what are thus particularly charged upon them.

And when they go from the bar, and have brought in their verdict touching theſe particulars thus charged upon them, then, if the ſame jury paſs upon the remaining priſoners, yet they are to be called over again, the priſoners reminded of their challenges, and the jury ſworn *de novo* upon the trial of the reſt of the priſoners.

For in law the jury is charged with no more than thoſe, that have their indictments and plea of *not guilty*, and evidence concluded againſt and for them before the jury, tho poſſibly all the priſoners, that have pleaded, ſtood at the bar, when the jury was firſt ſworn; and this is the conſtant courſe at *Newgate*.

By the antient law, if the jury ſworn had been once particularly charged with a priſoner, as before is ſhewed, it was commonly held they muſt give up their verdict, and they could not be diſcharged before their verdict given up, and ſo is my lord *Coke*, *P. C. cap.* 47. *p.* 110. and this is the reaſon given 22 *E.* 3. *Coron.* [295] 449. why after the plea of *not guilty*, and the inqueſt charged, the priſoner cannot become an approver, becauſe the inqueſt ſhall not be diſcharged; but the book at large, *viz.* 21 *E.* 3. 18. *a.* mentions not the charging of the inqueſt, but the plea of *not guilty* and the jury at the bar. *Co. Lit.* 227. *b.* But yet the contrary courſe hath for a long time obtained at *Newgate*, and nothing is more ordinary than after the jury ſworn, and charged with a priſoner, and evidence given, yet if it appear to the court, that ſome of the evidence is kept back, or taken off, or that there may be a fuller diſcovery, and the offenſe notorious, as murder or burglary, and that the evidence, tho not ſufficient to convict the priſoner, yet gives the court a great and ſtrong ſuſpicion of his guilt, the court may diſcharge the jury of the priſoner, and remit him to the gaol for father evidence, and accordingly it hath been practiſed in moſt circuits of *England*, (a) for otherwiſe many

(a) And ſo it was practiſed in *Whitebread*'s caſe in treaſon, ſee *State Tr. Vol.* II. *p.* 710, 827. See alſo *Kel.* 47, 52. But the reaſon given for this practiſe, if it were law, (which yet without the priſoner's conſent is unwarranted by antient uſage; *vide* 3 *Co. Inſt.* 110. *Co. Lit.* 227. *b.* 1 *And.* 103. *Raym.* 84. *State Tr. Vol.* II. *p.* 951.) ſeems to hold as ſtrongly in behalf of the priſoner as of the king. *State Tr. Vol.* IV. *p.* 190. and yet I do not find any inſtance, where a jury once ſworn was ever diſcharged, becauſe the *priſoner*'s evidence was not ready; on the contrary in lord *Ruſſel*'s caſe, the court refuſed to put off the trial only till the afternoon of the ſame day, pretending they could not do it without the conſent of the attorney general, altho

many notorious murders or burglaries may paſs unpuniſhed by the acquittal of a perſon probably guilty, where the full evidence is not ſearched out or given.

If after the jury ſworn and departed from the bar, one of them, *viz.* *A.* wilfully goes out of town, whereby only eleven remain, theſe eleven cannot give any verdict without the twelfth, but the twelfth ſhall be fined for his contempt, and that jury may be diſ-
[296] charged, and a new jury ſworn, and new evidence given, and the verdict taken of the new jury, and thus it was done by good advice at the gaol-delivery at *Hertford Aug.* 15. *Car.* 1. in the caſe of *Hanſcom* the departing juryman.

And ſo it is uſual at the gaol-delivery at *Newgate*, if a jury be charged with ſeveral priſoners, and the court finds by probable circumſtances, that the jury is partial to one of the priſoners, the court may diſcharge the jury of that priſoner, and put him upon his trial by another jury, and this is uſed alſo in other circuits. (*)

Upon *not guilty* pleaded twelve are ſworn to try the iſſue, after their departure *A.* one of the twelve leaves his companions, which being diſcoverd to the court, by conſent of all parties *B.* another of the pannel is ſworn in the place of *A.* and afterwards *A.* returns to his company, which being made known to the court, *A.* is called and examined why he departed, he anſwered to drink, and being examined, whether he had ſpoken with the defendant, denied it upon his oath, whereupon *B.* was diſcharged from giving any verdict, and the verdict taken of *A.* and the other eleven, and *A.* fined for his contempt, 34 *E.* 3. *Office de Court* 12. in treſpaſs.

If thirteen are by miſtake ſworn, the ſwearing of the laſt of the thirteen is void, and the other twelve ſhall ſerve.

If only eleven be ſworn by miſtake, no verdict can be taken of the eleven, and if it be, it is error; and ſo in a preſentment, but if twelve be recorded ſworn, no averment lies, that one was unſworn. *Lamb's Juſtice* 395.

altho in that caſe the jury were not ſworn, and the priſoner urged, that he had witneſſes, who could not be in town till night, in which caſe it was certainly in the diſcretion of the court to put it off or not. *State Tr. Vol.* III. *p.* 630, 631. It hath however been ſince holden for law, that a jury once charged in a capital caſe cannot be diſcharged, till they have given their verdict, and the caſe of *Whitebread* was thought a very extraordinary one. See lord *Delamere's* caſe, *State Tr. Vol.* IV. *p.* 232. and *Rookwood's* caſe, *State Tr. Vol.* IV. *p.* 639, 651. and *Cook's* caſe, *State Tr. Vol.* IV. *p.* 751. *Foſter* 16, 39, 76, 328.

(*) *Quære de hoc.*

The

The juſtices at common law may upon a juſt cauſe remove a juror after he is ſworn. 20 *H.* 6. 5. *a.*

When the jurors depart from the bar, a bailiff ought to be ſworn to keep them together, and not to ſuffer any to ſpeak with them.

After their departure they may deſire to hear one of the witneſſes again, and it ſhall be granted, ſo he deliver his teſtimony in open court, and alſo they may deſire to propound queſtions to the court for their ſatisfaction, and it ſhall be granted, ſo it be in open court.

The jury muſt be kept together without meat, drink, fire, or candle, till they are agreed. 24 *E.* 3. 75. *(b)* *Co. Lit.* 227. *b.* [297]

If they agree not before the departure of the juſtices of gaol-delivery into another county, the ſheriff muſt ſend them along in carts, and the judge may take and record their verdict in a foreign county; *quære*, whether in ſuch caſes the ſeſſion may be adjourned before the verdict taken. 19 *Aſſiz.* 6. *per Scot.* 41 *Aſſiz.* 11.

If there be eleven agreed, and but one diſſenting, who ſays he will rather die in priſon, yet the verdict ſhall not be taken by eleven, no nor yet the refuſer fined or impriſond, and therefore where ſuch a verdict was taken by eleven and the twelfth fined and impriſond, it was upon great advice ruled the verdict was void, and the twelfth man deliverd, and a new *venire* awarded. 41 *Aſſiz.* 11. for men are not to be forced to give their verdict againſt their judgment *(c)*; *vide P.* 20 *E.* 1. *Rot.* 43. *Norf. coram rege.*

In

(b) N. Edit. of year books 24. *a.*

(c) But is it not a force, when any of the jurors are obliged to comply under the peril of being ſtarved to death, for how can it be expected, that twelve conſidering men ſhould in all caſes happen to be of the ſame ſentiments? and therefore antiently it was not neceſſary, (at leaſt in civil cauſes,) that all the twelve ſhould agree, but in caſe of a difference among the jury, the method was to ſeparate one part from the other, and then to examine each of them as to the reaſons of their differing in opinion, and if after ſuch examination both ſides perſiſted in their former opinions, the court cauſed both verdicts to be fully and diſtinctly recorded, and then judgment was given *ex dicto majoris partis juratorum*; thus in a great aſſiſe upon a writ of right between the abbot of *Kirkſtede* and *Edmund de Eyncourt* eleven of the jury found for the abbot, and one for *Edmund de Eyncourt*, in this caſe the verdict of the eleven was firſt recorded, Robertus *de* Harblinge *& omnes alii præter* Radulphum *filium* Simonis *dicunt ſuper ſacramentum ſuum, &c.* and then follows the *dictum* of the twelfth *Et prædictus* Radulphus *filius* Simonis *dicit ſuper ſacramentum ſuum, &c.* then follows the judgment, *Sed quia prædicti undecim concorditer & precisè dicunt, quòd prædictus abbas & eccleſia ſua prædicta majus jus habeant tenendi &c. ideo conſideratum eſt, quòd prædictus abbas & ſucceſſores ſui teneant prædicta tenementa de cætero in perpetuum, &c.* Placita coram juſtic' itinerant' in com' *Lincoln* anno 56 *Hen.* 3. *Rot.* 29. in dorſo.

In an aſſiſe of novel diſſeiſin between *William Triſtram* plaintiff, and *John Simenel* and others defendants, where the whole jury conſiſted of only eleven, ten found for *Triſtram*, and one for *Simenel*, and both verdicts are recorded in this manner, *Decem jurati dicunt, quòd, &c. & undecimus juratorum, ſcilicet* Johannes Kineth *dicit, &c. Et, quia dicto majoris partis juratorum ſtandum*

In capital cauſes, whether upon indictment or appeal, no verdict can be given by default in the abſence of the party. 16 *Aſſiz.* 13.

But if the priſoner hath pleaded to the country, and when [299] he is to be tried will ſay nothing, yet no penance ſhall be inflicted, but the jury ſhall be taken. 15 *E.* 4. 33. *b.*

Now touching the giving up of their verdict, if the jury ſay they are agreed, the court may examine them by poll, and if in truth they are not agreed, they are fineable. 29 *Aſſiz.* 27. 40 *Aſſiz.* 10.

If the jurors by miſtake or partiality give their verdict in court, yet they may rectify their verdict before it is recorded, or by advice of the court

dum eſt, quòd prædictus Willielmus *recuperet ſeiſinam ſuam de prædictis tenementis verſus prædictos* Johannem *& alios per viſum recognitorum & dampna quæ taxantur per jur' ad duas marcas &* Johannes *& alii in miſericordia.* Paſ. 14 *E.* 1. Rot. 10. coram Rege.

The like practice is ſuppoſed in the caſe here quoted by the author. *Paſ.* 20 *E.* 1. *Rot.* 43. *coram rege*, which was thus, *Martin Fitz-Oſbert* recovered ſeiſin of certain lands, *&c.* in *Weſt-Somerton* againſt the prior of *Buttelye* before *John de Lovetot* and *William de Pageham*, judges of aſſiſe in *Norfolk anno* 16 *E.* 1. The prior afterwards complained greatly, that injuſtice had been done him by *Lovetot* at the ſaid aſſiſe, and thereupon the biſhop of *Wincheſter* and others were ordered to hear the matter and do juſtice to the prior. Upon this *Lovetot* and *Pageham* were called before the ſaid biſhop, *&c.* and the prior objected to *Lovetot*, "Quòd fieri fecit falſam irrotulationem in rotulis ſuis, & contrariam veredicto juratorum aſſiſæ prædictæ, &c. & hoc paratus eſt verificare per "prædictos juratores, qui omnes ſunt ſuperſtites, &c." To which *Lovetot* and *Pageham* replied by juſtifying themſelves, and inſiſting, "Quòd benè, & rité proceſſerunt ad captionem illius aſſiſæ, unde "vocant recordum rotulorum ſuorum, "&c." in which the judgment pronounced by *Lovetot* was entered in the following manner, "Et quia per prædictum aſſiſam "convictum [compertum] fuit, quòd *Edricus*, de quo prædictus *Martinus* exivit, "fuit liber homo & liberæ conditionis; "& quamvis ipſe *Edricus*, & exitus de "ipſo proveniens tenuiſſent de prædicto "Priore & de prædeceſſoribus ſuis, tenementa ſua in villenagio, & per villana "ſervitia, hoc eis non præjudicat, quò "minus corpora ſua ſint libera; eò quòd "nulla præſcriptio temporis poteſt libertatem ſanguinem in ſervitutem reducere, "ideo conſideratum eſt, quòd prædictus "*Martinus* recuperet inde ſeiſinam ſuam, "&c. Et *Johannes* de *Pykering* unus recognitorum præfatæ aſſiſæ, pro eo quòd "in veredicto præfatæ aſſiſæ, narrando "illud veredictum, contrarius fuit omnibus aliis recognitoribus, narrando aliud "quàm inter illos fuit proviſum, ſicut per "examinationem eorum convictum [compertum] fuit, & manucaptus eſt per, &c. "ideò ipſe & manucaptores ſui in miſericordiâ. Et præceptum eſt vic', quòd "capiat prædictum *J.* de *Pykering*, & ſalvo, &c. ita quod habeat corpus ejus apud "*Kenteford*, &c. ad faciendam redemptionem ſuam pro tranſgreſſione prædicta." The biſhop of *Wynton* and his fellows then proceeded to examine *Lovetot* and *Pageham* touching the ſaid judgment. "Et "quia in conſideratione ſuper veredicto "primæ aſſiſæ compertum eſt, quod *J.* de "*Pykering* unus recognitorum prædictæ "aſſiſæ, narrando illud veredictum, contrarius fuit omnibus aliis recognitoribus, "narrando aliud quàm inter eos fuit proviſum; & nichil de illo contrario in recordo prædicto ſpecificatur ſive declaratur; immo quod veredictum captum "fuit & receptum, ac ſi omnes de uno & "de eodem aſſenſu fuiſſent in veredicto "prædicto; nec etiam veredictum ipſorum undecim declaratur ſive ſpecificatur, "&c. nec duodecimus ab undecim fuit "ſeparatus, nec examinatus per ſe; nec "undecim à duodecimo fuerunt ſeparati, "nec per ſe examinati &c. *prout moris eſt "in tali caſu*; & ſic ex contrario veredicto "ſubſecutum fuit judicium non legi ſive "conſuetudini regni conſonum, videtur "manifeſtè, quòd recordum illud non eſt "plenum, ſeu perfectum, in hoc caſu, &c. "Concordatum eſt quòd aſſiſa prædicta "re-examinatur, &c." Upon this the ſheriff was orderd, quòd venire faciat hic &c. recognitores aſſiſæ prædictæ, & quòd ſcire faciat *Martin* to appear at the ſame day ad audiendum, &c. "Poſtea ad præ-"dictum diem venerunt recognitores aſ-

"ſiſæ

court go together again and conſider better of it, and alter what they have delivered. *Plow. Com.* 211. *b. Saunder's* caſe.

But if the verdict be recorded, they cannot retract nor alter it. *Co. Lit.* 227. 7 *R.* 2. *Coron.* 108. 20 *Aſſiz.* 12. 5. *H.* 7. 22. *b.*

In a caſe of felony or treaſon the verdict muſt be given in open court, and no privy verdict can be given. *Co. Lit.* 227. *b. Co. P. C.* 110.

If a man be arraigned upon an inqueſt of murder or manſlaughter taken by the coroner, and be found *not guilty*, the jury that acquits him ought to inquire, who committed the fact, and that ſhall ſerve as an indictment againſt that perſon, that the jury find did the fact.

" ſiſæ prædictæ. Et quia prædicti *Johan-*
" *nes* & *Willielmus* aliud recordati fuerunt,
" quàm compertum fuit per recordum ro-
" tulorum ipſius *Johannis*; & etiam quia
" juratores prædicti minùs ſufficienter fue-
" runt examinati ſuper articulis prædictis,
" ſicut patet in recordo prædicto, iteratò
" fuerunt juratores jurati, & examinati;
" qui dicunt ſuper ſacramentum ſuum,
" quòd prædictus *Martinus* fuit villanus
" ipſius Prioris die quo ejectus fuit de præ-
" dictis tenementis, &c. Et quia com-
" pertum eſt, &c. & quòd Prior ad præ-
" dictam aſſiſam coram præfatis *J.* & *W.*
" reſpondebat per ballivum ſuum, qui qui-
" dem ballivus non potuit deducere in ju-
" dicium jus ſanguinis nativi domini ſui
" abſque præſentiâ domini ſui, &c. ac
" etiam in ſupradicto recordo quòd nulla
" præſcriptio longi temporis poteſt liberum
" ſanguinem in ſervitutem reducere, quòd
" omninò falſum eſt, &c. videtur, quòd
" judicium *J.* de *Lovetot* erroneum eſt;
" ideò conſideratum eſt, quòd prædictus
" Prior rehabeat prædicta tenementa, ita
" quòd omnia ſint in eodem ſtatu, in quo
" fuerunt ante captionem prædictæ aſſiſæ."
Afterwards by writ of error the record coram epiſcopo *Wynton* and ſociis ſuis auditoribus querelarum was brought coram rege, and *Martin Fitz-Oſbert* aſſigned for error, that he had recovered ſeiſin againſt the ſaid Prior " in groſſo veredicto ſuper
" diſſeiſinâ ſecundùm legem communem;
" & auditores ſine brevi regis inde eis di-
" recto, & ſine aliquâ præmunitione ipſo
" *Martino* ritè factâ, contra legem commu-
" nem, ipſum à prædicto tenemento abju-
" dicaverunt, & contra tenorem Magnæ
" Cartæ domini regis: Dicit inſuper, quòd
" prædicti auditores venire fecerunt coràm
" eis juratores præfatæ aſſiſæ in formâ cer-
" tificationis, & ipſos juratores per ſacra-
" mentum ſuum reexaminaverunt & admi-
" ſerunt veredictum eorum contrarium ve-
" redicto per ipſos priùs pronuntiato; un-
" de dicit, quòd in hiis & aliis erratum eſt,
" &c." To this the prior replied, that the ſaid *Martin* had been " Præmunitus per
" breve, quod vocatus *ſcire facias*; & quòd
" prædicti auditores habuerunt plenam po-
" teſtatem, tàm per breve domini regis,
" quàm per ſpeciale præceptum domini
" regis, ad corrigenda records juſticiario-
" rum vitioſa & erronea inventa—& hoc
" ſatis conſtat domino regi & ipſius conſi-
" lio, & quòd prædictus *Martinus* non re-
" cuperavit per groſſum veredictum; quia
" non fuit ibi veredictum niſi tale, quale
" imperfectum, quia per xi juratores cap-
" tum; & quòd prædicti auditores non ad-
" miſerunt contrarium veredictum priori
" veredicto, quia veredictum priùs captum
" coram *J.* de *Lovetot* fuit tale, quale im-
" perfectum, & contra legem terræ captum
" per xi juratores, de ſtatu ſanguinis ultra
" tempus limitatum; ſecundum veredic-
" tum magis deberet dici ſuppletio prioris
" veredicti defectivi, quàm eidem contra-
" riari." To which *Martin* rejoined, and inſiſted, " Quòd prædicta aſſiſa fuit plena
" & perfecta coram *J.* de *Lovetot* & ſociis
" ſuis juſtic' capta, & hoc liquat expreſsè
" in eodem recordo, ubi dicit *Jurati di-*
" *cunt*, &c. Et quòd ipſe recuperavit præ-
" dicta tenementa per groſſum veredictum
" præfatæ aſſiſæ, petit judicium, ſi præ-
" dictum groſſum veredictum ſuper diſſei-
" ſinâ præcisè factâ aliquo modo ſecun-
" dùm legem & conſuetudinem regni *An-*
" *gliæ* debet adnichillari, abſque brevi de
" attinctâ, &c.

The judgment in this caſe does not appear, but it ſhould ſeem, that the reaſon why the record of the verdict is ſaid to be imperfect was not, becauſe all the twelve did not agree, but becauſe the *dicta utriuſque partis* were not diſtinctly ſpecified and recorded, which is declared to be the uſage in ſuch caſe, *prout moris eſt in tali caſu.*

But

But it is held, that if a man be arraigned upon an indictment found by the grand inqueſt, and be acquitted, the jury ſhall not make ſuch further inquiry. 14 *H.* 7. 2. *b.* 13 *E.* 4. 3. *b.* 37. *H.* 8. *B. Coron.* 117. 11 *H.* 4. 93. *a. B. Coron.* 32. 21 *E.* 3. 17. *b. B. Coron.* 39.

But ſurely the antient law was otherwiſe, and that the jury that acquits, whether upon a preſentment, or upon an indictment of homicide, ſhall be chaced to ſay, who did the fact. 37 *Aſſiz.* 13.

So if a man be indicted *de morte cujuſdum ignoti*, the inqueſt ſhall be charged to tell the name, if they can. 2 *E.* 3. *Coron.* 159.

A man is indicted of robbery and acquitted, but it appeared to the court, that a robbery was done, but the priſoner *not guilty*, and therefore upon the ſtatute of *Wincheſter* the court compelled the jury to preſent who did it, for the hundred is to anſwer for the bodies of the offenders, and the book concludes generally, *Et tiel courſe tiendra, ou home eſt indite de mort de home & acquit* 3 *E.* 3. *Iter North. Coron.* 307. ſo that they made no difference, where the [indictment was by the grand inqueſt, or by the coroner's inqueſt.]

The ſame law in a appeal 22 *Aſſiz.* 39. *Coron.* 178. 4 *H.* 7. *Rot.* 21. *Raſtal's Entries* 57. *a.*

[301] But at this day the law and practice hath obtained, that only upon an arraignment upon the coroner's inqueſt the jury, if they acquit the priſoner, ſhall inquire who did the murder or manſlaughter, and commonly it is a buſineſs of form, for they uſually ſay, if it be not known, that *John a-Nokes* did it. 37 *H.* 8. *B. Coron.* 32. 21 *E.* 3. 17. *b. B. Coron.* 39. *Dy.* 238. *b.*

And as to indictments of robbery, if the petit jury acquit the priſoner, they do not inquire who did it, and the reaſon of the difference is, that for the moſt part in *Eyre* the petit jury were all of the ſame hundred, where the offenſe was committed, and then upon the ſtatute of *Winton* the hundred were to anſwer *de corporibus malefactorum*, and therefore it was reaſon to put them upon the inquiry, who committed the robbery, if it appears to the court, that a robbery was committed, and the caſe of 3 *E.* 3. *Coron.* 307. was in *Eyre*, but now the jury, that tries, as well as inquires, is for the moſt part of the reſt of the county, and therefore they anſwer only the point of *guilty* or *not guilty*: *vide Stamf. P. C.* 181. *a.*

The jurors of the petit inqueſt are charged to inquire if the party fled, and ſo of his goods and chattels, this is but an inqueſt of office, and traverſable; *vide ſupra Part* I. *cap.* 27. *p.* 362. But is hath been held, that

that a preſentment of flight before the coroner *ſuper viſum corporis* is concluſive to the party, and not traverſable: *vide quæ ſupra dixi, Part* I. *cap.* 31. *p.* 416, 417.

And therefore it is, that if the coroner's inqueſt *ſuper viſum corporis* preſent a *fugam fecit*, and the party be taken and arraigned, and pleads to that indictment, the jury ſhall not be charged to inquire of the *fugam fecit*, becauſe found before by the coroner's inqueſt, and if they be charged therewith and acquit the priſoner, and likewiſe ſay, that he did not fly, yet the record of the inquiſition before the coroner finding the flight ſhall take place to intitle the king. 3 *E.* 3. *Forfeiture* 35. *P.* 7 *Eliz. Dy.* 238. *b.*

The jury may find a ſpecial verdict, or may find the defendant guilty of part, and not guilty of the reſt, or may find the defendant guilty of the fact, but vary in the manner. [302]

If a man be indicted of burglary, *quòd felonicè & burglariter cepit & aſportavit*, the jury may find him guilty of the ſimple felony, and acquit him of the burglary and the *burglaritèr*.

So if a man be indicted of robbery with putting the party in fear, the jury may find him guilty of the felony, but not guilty of the robbery.

The like where the indictment is *clàm & ſecretè à perſonâ*.

So if a man be indicted upon the ſtatute of 1 *Jac.* of ſtabbing *contra formam ſtatuti*, the jury may acquit him upon the ſtatute, and find him guilty of manſlaughter at common law. 23 *Car.* 1. *Harwood's* caſe *(d)*.

So if a man be indicted of ſtealing of goods of the value of 10*s.* the jury may find him guilty only of goods to the value of 6*d.* and ſo guilty only of petit larceny. 41 *E.* 3. *Coron.* 451. *Stamf. P. C. L.* III. *cap.* 9. *fol.* 165. *a.*

So if a man be indicted of murder *ex malitiâ præcogitatâ*, the jury may find him guilty of manſlaughter. *Co. Lit.* 282. *a.* or that he killed him *ſe defendendo*, or *per infortunium*; but *nota* in theſe caſes it is not ſufficient generally to find it done *ſe defendendo*, or *per infortunium*, but the ſpecial matter muſt be ſet down how it was done, and if upon the ſpecial matter ſhewn it ſhall appear to be murder or manſlaughter, the court will accordingly judge of it, tho the jury conclude, *Et ſic per infortunium*, or *ſic ſe defendendo*. 3 *E.* 3. *Coron.* 284, 286, 287, & 43. *Aſſiz.* 31. *Coron.* 226.

(*d*) *Style* 86.

And

And in theſe caſes, tho it be found *per infortunium*, or *ſe defendendo* upon the ſpecial matter ſet forth, yet this ſpecial matter muſt be recorded, for tho it be not ſuch a felony, as hath judgment of life, yet it is ſuch an offenſe, as gives the forfeiture of goods, and therefore they may not find a general *not guilty*, but muſt find the ſpecial matter, and leave it to the court to judge.

[303] At the ſeſſions at *Newgate* 16 *Car.* 2. upon the evidence it appeard, that *A.* a boy riding in the ſtreet upon an horſe, *B.* another boy whipt the horſe, the horſe ran away againſt the will of *A.* and ran over a child and kild it, for this *A.* was indicted of murder by the grand inqueſt, and the jury found him generally *not guilty*; the court was in doubt of receiving the verdict, becauſe it was *per infortunium*, and ſo ought ſpecially to be found, but becauſe the coroner's inqueſt had found the ſpecial matter, and concluded it, as in truth it was, *per infortunium*, which preſentment *A.* was ready to confeſs, that ſo he might have his pardon of courſe, the verdict of *not guilty* was recorded, and ſo it was ſaid was the uſual courſe in that caſe; but it was agreed, that if *A.* had of his own accord put the horſe into ſpeed, and he had ſo kild the child, it had not been *per infortunium* but manſlaughter. *Richard Pretty*'s caſe for killing *Anne Jones*.

But now ſuppoſe the priſoner kild the party, but yet in ſuch a way as makes no felony, as if he were of *non ſane memory*, or if a man kills a thief, that comes to rob him, or to commit a burglary, or if an officer in his own defenſe kills one, that aſſaults him in the execution of his office, which are neither felony nor forfeiture, whether is it neceſſary to find the ſpecial matter, or may the party be found *not guilty*? *Foſter* 265.

And I think, and ſo I have known it conſtantly practiſed, the party in theſe caſes may be found *not guilty*, and the jury need not find the ſpecial matter.

And the reaſon is, that in theſe caſes there is neither felony nor forfeiture.

And this is in effect declared by the ſtatute of 24 *H.* 8. *cap.* 5. "If "any attempt to commit murder, robbery or burglary in or nigh "any common high way, or in the manſion-houſe, *&c.* and the evil "doer be ſlain, and if the ſame by verdict be found or tried, the "ſlayer ſhall not loſe any goods or chattels, but ſhall thereof be "fully acquitted and diſcharged in like manner as he ſhould be, if "he

" he were lawfully acquit of the death," and accordingly ruled in *Cooper's* caſe. *P.* 15 *Car. B. R. Croke, p.* 544.

But it is uſed in ſuch caſes (and prudently enough), for the coroner's inqueſt to find the ſpecial matter, and the bill [304] of indictment of the grand jury to be for murder, and to have the party arraigned upon the bill of indictment, and to be acquitted thereupon upon trial, and to enter the acquittal upon the bill, and then to confeſs the coroner's preſentment, and to have judgment alſo thereupon; thus it was done in the caſe of *Richardſon* keeper of *Newgate*, who kild *Hyde*, that had committed a robbery and made reſiſtance, that he could not be taken without being kild. *M.* 25 *Car.* 2. at *Newgate*.

And therefore, where a thief was kild in purſuit becauſe of neceſſity, if the ſpecial matter be found, the killer ſhall have judgment, *quòd eat ſine die*. 22 *Aſſiz.* 55. *Coron.* 179. 22 *E.* 3. *Coron.* 258. 26 *Aſſiz.* 23. *Coron.* 192. 22 *E.* 3. *Coron.* 261. and the reaſon is, becauſe it is no felony, nor cauſeth any forfeiture ſo much as of goods, but is a juſtifiable act, and ſo differs from *ſe defendendo*, or *per infortunium*, which give a forfeiture of goods.

And ſince in an indictment or an appeal of felony the defendant cannot plead a juſtification, he ſhall have the advantage of it upon the general iſſue pleaded. 26 *H.* 8. 5. *b.* 37 *H.* 8. *B. Appeals* 122.

Yet *vide* 37 *H.* 6. 20 & 21. *per Needham* upon an indictment of murder the defendant may plead, that in an appeal before the conſtable and marſhal of treaſon he being appellee kild the appellant; yet in that caſe it ſeems, if he pleaded *not guilty*, he ſhall have advantage of that ſpecial juſtification upon evidence.

But [notwithſtanding] this, that I have ſaid, where the matter itſelf appears not to be felony, the priſoner upon *not guilty* pleaded may be found *not guilty*, without finding the ſpecial matter, and accordingly ruled. *P.* 15 *Car.* 1. *Croke, p.* 544.

Yet if the coroner's inqueſt find not the ſpecial matter but murder or manſlaughter, and the priſoner is arraigned upon it and plead *not guilty*, and upon the evidence it appear, that the priſoner kild the man, but in ſuch a manner as makes no felony, as a thief that aſſaults him upon the highway, or a thief that reſiſts [305] the arreſt, in this caſe the jury cannot find a general *not guilty*, but muſt find, that the priſoner did it, and the manner how, and this is to be entred of record, as in caſe of a verdict *ſe defendendo*.

And

And the reaſon of the difference is, becauſe in the former caſe the jury gives a verdict of *not guilty* generally, without inquiring who did the fact. But where a man is arraigned upon the coroner's inqueſt *ſuper viſum corporis*, and pleads *not guilty*, if the jury acquit the priſoner by *not guilty*, yet they muſt inquire who did it, for here it is apparent there was a man ſlain, becauſe the coroner takes the inqueſt upon view of the body, and if they ſhould find him generally *not guilty*, and yet ſhould upon their other inquiry find he kild him, it would be a contradiction in itſelf, and therefore in this caſe, they are to find the ſpecial matter, and thereupon the court ſhall give judgment for his diſcharge.

Many ſpecial verdicts have been found, as upon the ſtatute of ſtabbing, ſo upon the point, whether murder or not, but it is difficult to find them ſo that judgment may be given for murder, becauſe there are ſo many circumſtances required to be found, that if any be omitted, the verdict will fall only to manſlaughter.

I have rarely known upon any ſpecial verdict, where the queſtion was murder or manſlaughter, judgment to be given for murder *(d)*, but commonly for manſlaughter or *ſe defendendo*. *Tutius erratur ex parte mitiori.*

Burn. Tit. Jurors. ſect. 51

(d) There have been however ſeveral inſtances, wherein it has been done, *viz. Mackally's* caſe, 9 *Co. Rep.* 70. *a. Mawgridge's* caſe, *Hill.* 5 *Ann. B. R. Kel.* 120. *Oneby's* caſe. *Trin.* 13 *Geo. B. R.* all which were ſpecial verdicts, and the court ruled them to be murder.

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[306] CHAP. XLII.

Concerning the miſdemeanors of jurors, *and their* puniſhment.

IF any of the jury eat or drink without licenſe of the court before they have given up their verdict, they are fineable for it.

But tho it be not at the charges of either party, antiently it was held it would avoid the verdict. 24 *E.* 3. 24. *a.*

But at this day the law is ſettled, that it is only a miſdemeanor fineable in them that do it, but avoids not the verdict. 14 *H.* 7. 29. *b.* *(a)*. 20 *H.* 7. 3. *a.*

(a) *Vide pluis de ceo caſe* 15 H. 7. 1. b.

But

But if it be at the charge, for the purpoſe, of the priſoner, and the verdict find him guilty, the verdict is good; but if they find him *not guilty*, and this appears by examination, the judge, before whom the verdict is ſo given, may record the ſpecial matter, and thereupon the verdict ſhall be ſet aſide, and a new trial awarded. 14 *H.* 7. 30. *a. b.*

If a juryman before he be ſworn take information of the caſe, this is cauſe of challenge, as the law ſtands at this day, but antiently it was held otherwiſe, and that it was lawful, and that was the reaſon given in the ſtatute of 6 *H.* 6. *cap.* 2. which enacts, "That pannels "of aſſiſes be delivetd by the ſheriff to either party ſix days before "the ſeſſions, namely, that they might inform the jurors of their right "before the ſeſſion.

But this brought great inconvenience in embracery and tampering with jurors, and therefore it is juſtly diſuſed and diſapproved.

If a juryman have a piece of evidence in his pocket, and after the jury ſworn and gone together he ſheweth it to them, this is a miſdemeanor fineable in the jury, but it avoids not the verdict, tho the caſe appears upon examination. *M.* 23 *Car.* 1. [307] *B. R. M.* 40 & 41 *Eliz. B. R. Croke, n.* 1. *Graves & Short (b)*; *vide tamen contra* 11 *H.* 4. 18. *a.*

But if after the jury ſworn either party deliver a piece of evidence to the jury, and the verdict is given for him that deliverd it, it ſhall avoid the verdict, but then this muſt appear by examination, and be indorſed upon the *poſtea* or verdict, ſo as it appears of record, and it muſt not be barely by affidavit made after. *M.* 40 & 41 *Eliz. B. R. Graves & Short. Co. Lit.* 227. *b.*

But if the verdict be given againſt him that deliverd the evidence, the verdict is good. *Ibid.*

If a piece of evidence under ſeal be read in court, the jury ought regularly to have it with them, but not if it be not under ſeal.

But yet if after the jury ſworn a piece of evidence not under ſeal be by the court deliverd to the jury, it doth not avoid the verdict, and ſo it is, if it be deliverd by a mere ſtranger, or if it be deliverd by one of the parties, and the verdict be given againſt him, on whoſe behalf it was deliverd. *M.* 37 & 38 *Eliz. B. R. Croke, n.* 1. *(c)*

If after the jury ſworn and gone from the bar they ſend for a witneſs to repeat his evidence, that he gave openly in court, who doth it

(*b*) *Cro. Eliz.* 616. (*c*) *Vicary & Farthing, Cro. Eliz.* 411.

accordingly, this appearing by examination in court and indorſed upon the record or *poſtea* will avoid the verdict. *T.* 32 *Eliz. B. R. Croke, n.* 17. *Metcalfe* & *Deane (d). M.* 20 *Jac. B. R. Hillord* & *Hall (e)*, becauſe not done openly in court, nor in the preſence of the parties concerned. *M.* 32 *Eliz. B. R. Leon, n.* 426. *Elme's* caſe *(f)*.

But if the jury after their departure from the bar deſire to hear the teſtimony of a witneſs again, they may be ſent for into court, and the witneſs may be heard again openly, where the court or parties may aſk what queſtions they think fit.

[308] If depoſitions are read in court to the jury, and after the jury ſworn and going from the bar the ſolicitor or proſecutor for the king or party without conſent of parties or order of the court deliver the copies of the depoſitions to the jury, if they find againſt him on whoſe part the copies were deliverd, the verdict is good, but if they find for him on whoſe part they were deliverd, and this appear by examination, and be (as it ought to be) indorſed upon the *poſtea* or record, the verdict ſhall be quaſhed, and a new *venire facias*, or award for a new jury ſhall be returned. *M.* 20 *Jac. B. R. Hillord* and *Hall.*

If after the evidence given, where divers evidences are read on both ſides, and the clerk is making up his bundle of evidences, that were under ſeal, to deliver to the jury, the ſolicitor for the plaintiffs delivers a bundle of depoſitions to the jury, ſome whereof were read, and ſome not read, and upon examination this appeard, tho the jury ſwore they opened not the bundle deliverd by the ſolicitor, yet the verdict for the plaintiff was for this cauſe avoided, (the matter being indorſed upon the record) and a new *venire facias* awarded, for great inconvenience may be by ſuch a practice, and the oath of the jury, that never looked into them, was not regarded, for poſſibly it may be a miſdemeanor in them to look into it, which they ſhall not excuſe in this manner. *T.* 1653. *Webb* & *Taylor*, 2 *R. A.* 714. *pl.* 6.

If the party after the jury ſworn ſpeak with a juryman, but nothing touching the buſineſs in iſſue, this doth not avoid the verdict given after for him. *M.* 7. *B. R. per curiam.*

But if he or any in his behalf ſay to a juryman after his departure from the bar and before verdict given, the caſe is clear for the plain-

(d) *Cro. Eliz.* 189.
(e) 2 *Rol. Rep.* 261. *Palm.* 325.
(f) 1 *Leon.* 305.

tiff,

tiff, this ſhall avoid the verdict, if given for the plaintiff, for it is new evidence. *H.* 22 *Jac. B. R. Athil* & *Bulwer* adjudged. 2 *Rol. Abr.* 716. *pl.* 20.

If *A.* be challenged off, and twelve more ſworn, yet *A.* goes along with the twelve ſworn and is preſent at their conſultation, if *A.* give no new evidence, nor adviſed or directed them to find that party, for whom the verdict is given, the verdict is good, [309] but *A.* ſhall be fined for his miſdemeanor. *P.* 17 *Jac. B. R. Park's* caſe.

Now touching fining of jurors I ſhall add farther.

If a man, that is one of the indictors, be returned upon the petit jury, and do not challenge himſelf, he ſhall be fined. 40 *Aſſiz.* 10.

If a jury ſay they are agreed, and it being aſked, who ſhall ſay for them, they ſay their foreman, but upon farther inquiry they are not agreed, the jury ſhall be fined, *viz.* every one apart. 40 *Aſſiz.* 10. 29 *Aſſiz.* 27.

If a juryman be called and refuſe to appear, or if having appeard withdraw himſelf before he be ſworn, the court may ſet a fine upon him at their diſcretion: *vide Stat.* 35 *H.* 8. *cap* 6.

So if he be challenged, and while the challenge is trying withdraw himſelf, and the challenge is upon the trial diſallowd, and he be not preſent to be ſworn 36 *H.* 6. 27. *a.* or being ſworn withdraw himſelf from his fellows before the verdict given. 34 *E.* 3. *Office de court* 12.

If eleven of the jury be agreed, and the twelfth refuſe, and make his companions lie by it, heretofore ſuch juryman hath been impriſond for his wilfulneſs, 8 *Aſſiz.* 35. and fined, and the inqueſt taken by the other eleven jurors. 3 *E.* 3. *Verdict* 40.

But upon great conſideration both theſe courſes have been diſallowd, and the judgment upon the verdict of eleven jurors reverſed, and the juryman (fined and impriſond) diſcharged, as being contrary to law, for it may be the twelfth was in the right, yet howſoever his conſcience is not in this manner to be forced, and therefore former precedents of this kind have been diſallowd. 41 *E.* 3. 11. *a.* 41 *Aſſiz.* 11.

But what if a juror give a verdict againſt all reaſon, convicting or acquitting a perſon indicted againſt evidence, what ſhall be done? I ſay, if the jury will convict a man againſt or without evidence, and againſt the direction or opinion of the court, the court hath this

ſalve to reprive the perſon convict before judgment, and to acquaint the king, and certify for his pardon.

And as to an acquittal of a perſon againſt full evidence it is likewiſe certain the court may ſend them back again, and ſo in the former caſe, to conſider better of it before they record the verdict, but if they are peremptory in it, and ſtand to their verdict, the court muſt take their verdict and record it, but may reſpite judgment upon the acquittal.

But as touching puniſhing the jury, I ſhall ſay, what I think may be done, and what may not be done.

1. I think in ſuch a caſe the king may have an attaint, for altho a man convicted upon an indictment can have no attaint, becauſe the guilt is affirmed by two inqueſts, the grand inqueſt, that preſents the offenſe upon their oaths, and the petit jury, that agrees with them, yet where the petit jury acquits, they ſtand as a ſingle verdict, for they diſaffirm what the grand inqueſt of twelve men have upon their oaths preſented, and with this agrees the book 10 *H.* 4. *Attaint* 60, 64. *per Thorn.*

2. By the ſtatute of 26 *H.* 8. *cap.* 4. the juſticiar or ſteward, before whom any perſon is acquit of felony againſt pregnant evidence in *Wales* or the marches thereof, may bind over the jurors to appear before the preſident and council of the marches of *Wales*, who may, as they ſee cauſe, fine and impriſon ſuch jurors by their diſcretion.

3. I do confeſs in the king's bench there have been many precedents of jurors, that have acquitted perſons of murder, or other felony tried in that court, if they have gone againſt pregnant evidence, that have been fined, impriſond and bound to their good behaviour during their lives *(g)*.

The like hath been done before juſtices in *Eyre*, and the court of king's bench is a court in *Eyre* and much more, for that court may reverſe judgment given in *Eyre*. See for this purpoſe *T.* 43 *Eliz. B. R. Rot.* 979. *Noy's Rep. p.* 48 & 49. *Wharton's* caſe, where the jury in the king's bench acquitting the priſoner of murder againſt pregnant evidence, and finding it only manſlaughter were fined 20*l.* apiece, bound to the good behaviour and for the good behaviour of the priſoner, and committed, and this was done by the advice of all the judges. See the ſame caſe *M.* 44 & 45 *Eliz. B. R. Yelv. Rep. p.* 23.

[311]

(g) *Vide ſupra p.* 159.

M. 24

M. 42 & 43 *Eliz. B. R. Croke, n.* 12. *p.* 778. *Wats & Braines.* In an appeal of murder there was a confederacy among the jury to bring in the verdict *not guilty*, and if the court diſliked it, then to change their verdict, and accordingly they did, and the court diſliking their verdict they went out and found him guilty, and this agreement being diſcoverd, the principal confederates were fined and impriſond, but this fine was for their confederacy and practice, not for their verdict.

7 *R.* 2. *Coron.* 108. The jury acquitted a notorious robber in the king's bench againſt great evidence, and the court bound the jury for the good behaviour of the priſoner; the reporter makes a *quære per quel ley*, *vide* the notes annexed to *Benloe* 153. to the ſame purpoſe.

4. Again, in caſes of inqueſt of office there have been precedents in the *Exchequer*, and more frequent in the court of wards for fining of jurors, that would not find according to their evidence. *H.* 28 *Eliz. in Scaccario coram Theſſ. & baronibus.* 3 *Hughes* 196.

5. The practice of the king's bench to fine jurors for finding verdicts contrary to their evidence was endeavouring to be brought in practice before judges of *niſi prius*; and about 14 *Car.* 2. in an *Oxfordſhire* caſe *Huntingdon* and his eleven companions jurors were fined 5 *l.* apiece for ſuch a verdict, and the fine eſtreated into the *Exchequer*, but by the whole court by the advice of the greater part of the reſt of the judges proceſs was ſtayed upon that eſtreat, as being impoſed contrary to law *(h)*.

6. Before juſtices of *oyer* and *terminer* and gaol-delivery, if the jury acquitted a felon contrary to their evidence, the uſe was to bind them over to appear in the king's bench to anſwer an information, but I never knew any preferd, and indeed it were impoſſible almoſt for any judge or jury to convict a jury upon ſuch an account, becauſe impoſſible, that all the circumſtances of the caſe, that might move the jury to acquit a priſoner, could be brought in evi- [312] dence; this therefore ſeems to me to be but *in terrorem.*

7. But then it was endeavoured to bring the practice of the king's bench into uſe before juſtices of gaol-delivery and *oyer* and *terminer* to fine jurors in criminal cauſes for not obſerving the judges directions, and acquitting felons againſt their evidence, and accordingly a jury in *Glouceſterſhire* was fined 5 *l.* a man for acquitting a perſon in-

(*b*) *Vide antea cap.* 22. *p.* 160. *Vaugh.* 145.

dicted of burglary, the form of the fine was much the ſame as is hereafter mentiond, this fine was alſo eſtreated into the *Exchequer*, but all the court after great advice with the judges of the common pleas orderd a ſtay of proceſs thereupon, as being neither warrantable by law nor antient precedents in any court leſs than *Eyre*.

At the gaol-delivery at *Newgate* 10 *Maii* 17 *Car.* 2. *Wagſtaff (i)* and eleven other jurymen were fined five marks apiece for acquitting *Richard Tomſon* and others indicted for conventicles, *Eo quòd ipſi juratores adtunc & ibidem eoſdem* Ricardum Tomſon *&c. de prædictâ tranſgreſſione & contemptu contra regem hujus regni* Angliæ, *& contra plenam evidentiam, & contra directionem curiæ in materiâ legis ibidem de & ſuper præmiſſis eiſdem juratoribus versùs præfatos* Ricardum Tomſon *&c. in dictâ curiâ ibidem apertè dat' & declarat' de præmiſſis eis impoſitis in indictamento prædicto acquietaverunt in contemptum dicti domini regis nunc legûmque ſuarum, & ad magnam obſtructionem & impedimentum juſticiæ, necnon in malum exemplum omnium aliorum juratorum in conſimili caſu delinquentium.*

They were thereupon committed, and brought their *habeas corpus* in the court of common-bench, and all the judges of *England* were aſſembled to conſider of the legality of this fine, and the impriſonment thereupon, wherein there was ſome little diverſity of opinion, whether without a cauſe of ſuit returned alſo, the common pleas could give judgment touching this fine, and if there were cauſe, deliver the party, or whether he muſt go into the king's bench by *habeas corpus* and *certiorari*.

[313] But it was agreed by all the judges of *England*, (one only diſſenting,) that this fine was not legally ſet upon the jury, for they are the judges of matters of fact, and altho it was inſerted in the fine, that it was *contra directionem curiæ in materiâ legis*, this mended not the matter, for it was impoſſible any matter of law could come in queſtion, till the matter of fact were ſettled and ſtated and agreed by the jury, and of ſuch matter of fact they were the only competent judges.

And altho the witneſſes might perchance ſwear the fact to the ſatisfaction of the court, yet the jury are judges as well of the credibility of the witneſſes, as of the truth of the fact, for poſſibly they might know ſomewhat of their own knowledge, that what was ſworn

(i) In *Buſhell's* caſe, *Vaugh.* 153.

was

was untrue, and poſſibly they might know the witneſſes to be ſuch as they could not believe, and it is the conſcience of the jury, that muſt pronounce the priſoner *guily* or *not guilty*.

And to ſay the truth, it were the moſt unhappy caſe that could be to the judge, if he at his peril muſt take upon him the guilt or innocence of the priſoner, and if the judge's opinion muſt rule the matter of fact, the trial by jury would be uſeleſs.

Whereupon, and upon view of the precedents in the court of common bench, where priſoners not legally committed or fined had been diſcharged, tho no cauſe of privilege were returned, the jurors were diſcharged of their impriſonment.

And therefore, altho the long uſe of fining jurors in the king's bench in criminal cauſes may give poſſibly a juriſdiction to fine in theſe caſes, yet it can by no means be extended to other courts of ſeſſions of gaol-delivery, *oyer* and *terminer*, or of the peace, or other inferior juriſdictions.

3 Wilſon, 172, 177.

CHAP. XLIII. [314]

Concerning ſtanding mute, *and the puniſhment of* penance, *or* peine fort & dure. [*]

I HAVE hitherto conſiderd the pleas of the priſoner in capital cauſes, namely, 1. Confeſſion. 2. Pleas in bar, and 3. Pleas to the felony, or *not guilty*.

And I have conſiderd the proceedings in order to bring the party to his trial, and the trial thereupon by the jury.

It remains, that I ſhould now come to conſider what is to be done in caſe the priſoner will not anſwer, but ſtand mute and make no defenſe.

[*] But now by the ſtatute 12 *Geo.* 3. *c.* 30. If any perſon being arraigned on any indictment or appeal of felony, or on any indictment for piracy, ſhall upon ſuch arraignment ſtand mute, or will not anſwer directly to the felony or piracy, he ſhall be convicted of the offenſe, and the court ſhall thereupon award judgment and execution, in the ſame manner as if he had been convicted by verdict or confeſſion; and ſuch judgment ſhall have all the ſame conſequences, as a conviction by verdict or confeſſion.

And the ſame law is, with reſpect to an arraignment for treaſon or petty larciny. See *Burn. Tit. Mute.* 2 *Inſt.* 177. 2 *Hawk. P. C.* 329.

In this matter theſe things are conſiderable.

1. What ſhall be ſaid in law a *ſtanding mute*, and what not.

2. What the conſequence or penalty is of a ſtanding mute in capital cauſes, and therein of *peine fort* and *dure*.

3. What cautions are to be uſed before the inflicting of it.

4. By what law it is introduced.

I. As to the firſt of theſe.

If the priſoner hath received his judgement already, or be convicted and brought to the bar, and demanded what he can ſay, why judgment ſhould not be given againſt him, if convicted, or why execution ſhould not be awarded, and he ſaith nothing, yet this is not ſuch a ſtanding mute as is in hand, for he is already convict or attaint: And therefore in ſuch caſe, if the party ſo called hath always remained in cuſtody from the time of his plea of *not guilty*, if he be called to ſhew what he can ſay, why he ſhould not have judgment upon his conviction or execution upon his former judgment, [315] and he ſay nothing, it ſhall not be inquired, whether he can ſpeak or not, but he ſhall not have preſent judgment or execution, as the caſe requires. 10 *E.* 4. 19. *b.* But if long time hath paſſed between his conviction or judgment and this ſecond calling to the bar, it is prudent to make the inquiry, at leaſt by witneſſes, whether he can ſpeak, for poſſibly he may have a pardon to plead.

But if a man abjure or be outlawd of felony, and after return again, and be taken and brought to the bar to ſhew cauſe why execution ſhould not be done, if he ſtand mute, an inqueſt of office is to be taken by the court to inquire, whether he can ſpeak or not, and if it be found, that by viſitation of God ſince his abjuration, *&c.* he hath loſt his ſpeech, it ſhall be alſo inquired, whether it be the ſame perſon containd in the record of outlawry or abjuration, before judgment or execution (as the caſe requires), ſhall be awarded againſt him, for he may plead in bar of execution in ſuch caſe, that he is not the ſame perſon. 10 *E.* 4. 19. *b.* 8 *H.* 4. 1. *b.* And ſo it ſeems to be, if he were brought *in* upon a *capias utlegat'* or *habeas corpus* by the ſheriff; *de quo infra.*

And therefore the book of 26 *Aſſiz.* 19. that ſaith a party abjured ſtanding mute ſhall have *peine fort & dure* is miſtaken, for he ſhall be hanged, if he ſtand mute of malice. *Stamf. P. C. Lib.* II. *cap.* 60. *fol.* 150. *b.*

If

If a man indicted of felony demur to the indictment, and will not otherwiſe anſwer, this is no ſtanding mute, but if the demurrer be ruled againſt him, he ſhall have judgment of death. 14 *E.* 4. 7. *a. per cur.*

If a man indicted or appeald of felony pleads *not guilty*, and puts himſelf upon the country, and the jury remains upon challenges till another day and then appears, and the priſoner at the bar will ſay nothing but ſtand mute, yet this is not a ſtanding mute, for the inqueſt ſhall be taken upon the iſſue already joined; and ſo in an appeal. 15 *E.* 4. 33. *b.*

And yet even in that caſe it is poſſible the priſoner may be taken dumb between his plea and his trial, and ſo loſe ſome advan- [316] vantages, that the law gives him for his defenſe, as callenges, examination of witneſſes and many matters for his defenſe; [therefore] the court hath uſed ſometimes by inqueſt, ſometimes by inquiry *ex officio* by the inqueſt impannelled to try his iſſue to inquire, whether he ſtand mute of malice, and then to try him, or if it be *ex viſitatione Dei*, then to reſpite his trial, but if he ſpoke the ſame day in the hearing of the court, then ſuch inqueſt of office is not taken, for the court is of their own knowledge aſcertained of his ability to ſpeak. 43 *Aſſiz.* 30. 8 *H.* 4. 1 & 2.

The ſtanding mute of a priſoner is not, where he hath pleaded *not guilty* and put himſelf upon the country, tho afterwards he would retract it.

If a priſoner for felony plead *not guilty* and put himſelf upon the country, and when the jury appears he challengeth peremptorily above thirty-five, in ſuch caſe the jury was not to be taken, but judgment of penance was antiently given againſt him, and ſo it was no attainder in caſe of felony. 17 *Aſſiz.* 6. 17 *E.* 3. 23. *a.* 14 *E.* 4. 7. *a.* 3 *H.* 7. 12. *a.* 2. *a.*

But the law herein was after declared otherwiſe, and by the advice of all the judges judgment of death ſhall be given, and ſo it was an attainder. 3 *H.* 7. 12. *a.* where it was ſettled for a rule in all circuits, and ſo it continued until 22 *H.* 8. *cap.* 14. when by act of parliament the challenge was reduced to twenty, and ſo the judgment of death upon peremptory challenge ceaſed, unleſs in high treaſon or petit treaſon, where it ſtands on foot as before, *vide Co. P. C. cap.* 102. *p.* 227, 228. who ſeems to hold, that for challenging above thirty-

thirty-five judgment of *peine fort & dure* ſhall be given according to 14 *E.* 4. 7. *a.* & 3 *H.* 7. 2. *a. per omnes juſticiarios contra Keble.*

Regularly therefore a man is ſaid to ſtand mute, when being arraigned for felony or treaſon, either 1. He anſwers not at all, or 2. If he anſwers with ſuch matter, as is not allowable for anſwer, and will not anſwer otherwiſe, or 3. Where he pleads *not guilty*, but when demanded how he will be tried, either will ſay nothing, or not put himſelf upon the country.

[317] If he ſtand mute and ſay nothing at all, in caſe of felony the court ought *ex officio* to impannel a jury and ſwear it as an inqueſt of office to inquire, whether he ſtand mute of malice, and if found ſo, he ſhall have the judgment of *peine fort & dure*, or whether it be *ex viſitatione Dei*, and if found ſo, they are to inquire touching all thoſe points, which he might poſſibly plead for himſelf, as whether a felony were done, whether he be the ſame perſon, that is indicted for it, whether he did it, and whether he hath any matter to alledge for his diſcharge.

But what if all this be found againſt the priſoner, what ſhall be done? whether judgment of death ſhall be given againſt him, tho he never pleaded, ſeems yet undetermined *(a)*.

If a man plead *not guilty*, and being demanded how he will be tried anſwers by God and holy church 4 *E.* 4. 11. *a.* or delivers in a protection 7 *E.* 4. 29. *a. Coron.* 30. or will not put himſelf upon trial of his country, this is a ſtanding mute, as much as if he had not at all pleaded.

II. As to the conſequences of ſtanding mute.

In caſe of an indictment of high treaſon, the party ſtanding mute, judgment of high treaſon ſhall be given againſt him as upon a *nihil dicit*, *M.* 3 & 4 *Eliz. Dy.* 205. *a. rule accordant. Stamf. P. C. Lib.* II. *cap.* 60. *fol.* 150. *a.* 2 *Co. Inſt. ſuper ſtat' Weſtm'* 1 *cap.* 12. *vide infra*, *cap.* 44.

In an appeal antiently it had been held, that if the priſoner ſtands mute, judgment ſhould be given for the appellant. 21 *E.* 3. 18. *a.* (*).

But afterwards the law was held all one in caſe of an appeal and of an indictment, namely the defendant ſtanding mute judgment of *peine fort & dure* was given againſt him, and the ſtatute of *Weſtm'* 1. *cap.*

(a) Vide B. Corone 217. where a perſon, who could neither ſpeak nor hear, was arraigned for felony; *vide Part* I. *p.* 34. *in notis.*

(*) See *State Tr. Vol.* I. *p.* 367. lord *Audley's* caſe.

12 ſpeaks

12. ſpeaks only of the *king*'s ſuit, (†) *vide* 43 *Aſſiz.* 30. 3 *H.* 7. 2. *a.* 14 *E.* 4. 7. *a.*

If a man be indicted of felony and ſtands mute, he ſhall be put to penance, *T.* 18 *E.* 2. *B. R. Rot.* 20. *in dorſo, Berks, rex (b).* And yet *vide H.* 18 *E.* 3. *B. R. Rot.* 16. *Ebor. rex, Petrus* [318] *Geildhird* arraigned *(c) pro deprædatione in regiâ viâ* ſtood mute, and an inqueſt of office being charged to inquire, if it were wilful, and found ſo, he had judgment to be hanged.

On the other ſide *T.* 30 *E.* 3 *Rot.* 11. *in dorſo Hunt. rex,* The biſhop of *Ely* arraigned for felony *dicit, quòd ipſe eſt membrum ſanctæ eccleſiæ, & epiſcopus unctus, & frater domini Papæ,* and that he could not anſwer without the archbiſhop of *Canterbury* [his ordinary] *coram laico judice*; there went out thereupon a writ to the ſheriff of *Hunt.* to return twenty-four to inquire of the whole fact, and by the inqueſt he was found guilty of the felony charged upon him, [*de receptamento felonûm*] and his goods ſeiſed, but he was demanded by the archbiſhop of *Cant.* and delivered to him as a member of holy church, ſo that there the fact was inquired of, tho the biſhop refuſed to anſwer, which was a kind of ſtanding mute *(d).*

By the ſtatute of 33 *H.* 8. *cap.* 12. any perſon arraigned before the lord ſteward for treaſon, murder, manſlaughter, or blood-ſhed in the king's palace, and ſtanding mute ſhall have judgment, as if convicted ſo there is no penance in that caſe.

But upon the ſtatute of 28 *H.* 8. *cap.* 15. for commiſſioners of the admiralty proceeding in maritime felonies, *&c.* there is no [319] ſuch excluſive proviſion, and therefore they follow herein the

(†) 2 *Co. Inſt.* 178.

(*b*) This was the caſe of *Stephen le Ferrour*, who was indicted before juſtices of *oyer* and *terminer pro receptamento felonûm*, and upon being arraigned *mutum ſe tenuit*, a jury was impannelled *ex officio*, who found *quòd mutum ſe tenet de merâ & ſpontaneâ voluntate ſuâ, & quòd loqui poteſt ſi velit*, and he was thereupon put to penance, *ad pœnam*; the record was removed by writ of error *coram rege*, where he pleaded *not guilty*, and was committed to the marſhall and afterwards produced the king's pardon, *Ideo inde quietus.*

(*c*) It appears by the record, that it was not upon arraignment, that he ſtood mute, for he had fled from juſtice and was outlawed, but being afterwards taken he was brought into court, and demanded why execution ſhould not be done upon him in purſuance of the outlawry, to this he made no anſwer; but this is not a ſtanding mute to the purpoſe in hand, as our author himſelf hath ſhewn at the beginning of this chapter.

(*d*) This was not properly a ſtanding mute, but a claiming the benefit of clergy, (which in antient times was uſually done before pleading,) and was of the like nature with the caſe of *Alan de Beckingham Mich.* 20 & 21 *Edw.* 1 *Rot* 4. *in dorſo coram rege, Nottingham*, ſee *Part* 1. *p.* 343. *in notis.* and the caſe of *John de Boſco, P.* 6 *E.* 2. *B. R. Rot.* 2. *Eſſex*, ſee *Part* 1. *p.* 180. *in notis*, the reaſon therefore, why the fact was inquired of, was the ſame in this caſe, as in thoſe, *viz.* that it might be known *pro quali ordinario liberari debeat*, whether as a clerk convict or acquit. *Vide* 2 *Co. Inſt. p.* 638.

courſe

courſe of the common law, ſo that any perſon indicted for piracy before theſe commiſſioners ſtanding mute ſhall have judgment of *peine fort & dure*. *T.* 7. *Eliz. Dy.* 241. *b. Brooke*'s caſe.

The judgment of *peine fort & dure* is, as it is recited by *Stamf. P. C. Lib.* II. *cap.* 60. *fol.* 150. *b.* & 4 *E.* 4. 11 *b. viz.* "That he be "ſent to the priſon from whence he came, and put into a dark, lower "room, and there to be laid naked upon the bare ground upon his "back without any clothes or ruſhes under him or to cover him except "his privy members, his legs and arms drawn and extended with cords "to the four corners of the room, and upon his body laid as great a "weight of iron, as he can bear, and more. And the firſt day he "ſhall have three morſels of barley bread without drink, the ſecond "day he ſhall have three draughts of water, of ſtanding water next "the door of the priſon, without bread, and this to be his diet till he "die" *(e)*. *Vide* the entry thereof *Raſt. Entries* 385. *a.*

This judgment is given for his contempt in refuſing his legal trial, and therefore he thereby forfeits his goods, but it is no attainder, nor gives any eſcheat or corruption of blood: *vide* 34 *E.* 3. *Eſcheat* 10. *Dy.* 308. *a.* 14 *E.* 4. 7, *a.*

The ſeverity of the judgment is to bring men to put themſelves upon their legal trial, and tho ſometimes it hath been given and executed, yet for the moſt part men bethink themſelves and plead.

If a peer of the realm arraigned upon an indictment of felony before his peers refuſes to plead, [he ſhall have] this judgment of *peine fort & dure*. *P.* 17 *Car.* 1. *caſus domini Caſtlehaven. (f)*.

And a woman ſhall have the ſame judgment if ſhe ſtands mute. 2 *Co. Inſt.* 177. *ſuper ſtat. Weſtm'* 1. *cap.* 12. *Wiſeman*'s caſe there cited.

[320] If a man be indicted of petit larceny and refuſes to plead, it ſeems judgment of *peine fort & dure* ſhall not be given, but the party convict, for he is not to have judgment of death.

But if a woman be indicted for ſimple larceny of goods under 10*s.* tho ſhe ſhall not die for it, but only be burnt in the hand by the ſtatute of 21 *Jac. cap.* 6. yet if ſhe refuſes to plead, the judgment of *peine fort & dure* ſhall be given againſt her, becauſe it may fall out upon tho caſe, that ſhe hath been burnt in the hand before, and then ſhe is to be executed; and it is but a privilege, as clergy is, which ſhe muſt put herſelf by her defenſe into a capacity of enjoying.

(e) But before they proceed to this extremity, it has been the practice to endeavour to make the priſoner plead by tying his thumbs together with whip cord. *Thorely*'s caſe *Kel.* 27.

(f) *State Tr. Vol.* I. *p.* 367.

If

If a new felony be made by act of parliament, tho it makes no proviſion touching the penalty of ſtanding mute, yet it is a neceſſary conſequence thereof, tho not ſpecially provided for, if it be not ouſted by the act, that makes it felony; as clergy is an incident to every new created felony, unleſs ſpecially ouſted by act of parliament (*), for they are incidents: *vide Dy.* 241. *b.*

And therefore in rape, tho made felony by *Weſtm'* 2. *cap.* 34. if the party indicted ſtand mute, he ſhall have judgment of penance. *P.* 7 *Car.* 1. lord *Caſtlehaven's* caſe.

Tho judgment be given of *peine fort & dure*, yet if the offenſe laid in the indictment be within clergy, his clergy ſhall be allowed him, which appears by the ſtatutes of 23 *H.* 8. *cap.* 1. 25 *H.* 8. *cap.* 3. and other ſtatutes that ouſt clergy, where the party ſtands mute, in ſome particular caſes, and by the books.

III. As for the third general, the neceſſary cautions to be uſed in inflicting this ſevere puniſhment are theſe.

1. Let not the judgment be too haſtily given, let the priſoner have not only *trina admonitio*, but alſo ſome convenient reſpite, poſſibly till the afternoon, to bethink himſelf, if the arraignment be in the morning; or till the next morning, if the arraignment be in the afternoon: and let the judgment itſelf be diſtinctly read to him, that he may know his danger before his final refuſal with due admonition not to deſtroy himſelf. 4 *E.* 4. 11. *b.* [321]

2. Before any judgment final be given, if the priſoner ſtands wholly mute and ſays nothing at all, let an inqueſt of office be taken to inquire, whether it be *ex malitiâ*, or *ex viſitatione Dei*, unleſs he hath ſpoken in court the ſame day, *vide Raſt. Entries* title *gaol-delivery.*

3. And likewiſe let the judge hear the witneſſes upon oath to give a probable teſtimony of his guilt, for tho his malicious ſilence carries with it a preſumption of guilt, yet it is good to have ſome concurrent teſtimony. 1. In reſpect of the ſeverity of the judgment. 2. Becauſe the ſtatute of *Weſtm'* 1. *cap.* 12. *de quo infra*, ſeems to require it.

4. If the offenſe laid in the indictment be within clergy, tho in ſtrictneſs of law the priſoner ought to pray it, yet it is the duty of the judge to allow it, tho not prayed, and that as well after judgment pronounced as before.

IV. Concerning the fourth particular, by what law this judgment of *peine fort & dure* is introduced.

(*) *Vide Part* I. *p.* 704.

By

By the ſtatute of *Weſtm'* 1. *cap.* 12. *Purvieu eſt enſement que les felons eſcries, & queux ſont apertement de male fame, & ne ſoy voilent mitter en enqueſt de felonies, que homes met ſur eux devant juſtices a la ſuit le roy ſoient miſes en la priſon fort & dure, come ceux queux refuſent eſtre al common ley de la terre, mes ceo neſt my a entender pur priſoners, que ſont priſes per legier ſuſpicion.*

Some *(h)* have antiently thought, that this act of parliament introduced the penance, and therefore they did antiently think it did not extend to an appeal, becauſe that is the ſuit of the party and not the ſuit of the king, *de quo antea p.* 317.

But it ſeems, that altho this ſtatute is in ſome points directive, namely, that it ſhould be applied to thoſe, that are of ill fame, and not thoſe, who are taken upon a light ſuſpicion, and therefore the court before they give this judgment ought either by inqueſt of office, or at leaſt by examination of witneſſes to inquire concerning the probabilities of the guilt: *vide Stamf. P. C. Lib.* II. *cap.* 60. *fol.* 150. *a.* yet this ſtatute doth not originally introduce the penance, but it was to be done by the common law, and accordingly it is agreed by my lord *Coke* in his comment upon this ſtatute 2 *Inſt. p.* 179.

[322]

And this appears 1. Becauſe this ſtatute only ſpeaks of impriſonment *fort & dure*, but enacts not the puniſhment itſelf by this lingering painful death, therefore the puniſhment, as it is thus inflicted, was at common law, and is by force of the common law. 2. Becauſe tho ſome antient opinions were, that it extended not to the caſe of an appeal of felony, yet the law hath conſtantly for many ages extended it to an appeal *(i)*, which cannot be by force of this ſtatute, but by the common law.

3. The antients, as *Fleta (k)*, *Britton (l)* and *Horn (m)*, tho they wrote ſince the making of this ſtatute, mention the penance without referring of it to this act of *Weſtm'* 1. *(n)*.

CHAP.

(h) Stamf. P. C. 149. *b. Poulton de pace regis* 211. *b.*

(i) Kel. 37.

(k) Lib. I. *cap.* 34. § 33.

(l) Cap. 4. § 23. & *cap.* 22. § 73.

(m) Mirror, cap. 1. § 9.

(n) This ſtatute was made 3 *E.* 1. and tho by the manner of the expreſſion it does not ſeem to have introduced this penance, but rather ſpeaks of it as a thing already known, yet I cannot find, that it is ever taken notice of in any antient author, book, caſe, or record before the reign of *E.* 1. on the contrary I find ſome inſtances in the preceding reign of perſons arraigned for felony ſtanding mute, who yet were not put to their penance, but had judgment to be hanged: at which time it ſeems to have been the uſual practice, that if the priſoner ſtood wilfully mute, a jury of twelve were impannelled *ex officio*, and if they found him guilty, another jury of twenty

CHAP. XLIV.

Concerning clergy *how it ſtood at* common law, *and how generally* at this day.

HAVING in the former chapter gone through the pleas and trials of the priſoners, and the proceeding upon ſtanding mute, I come to conſider the *privilegium clericale*, and I the rather refer it to be examined in this place, becauſe tho antiently clergy was prayed and allowed upon the arraignment of the priſoner, yet at this day it is rarely done but upon his conviction or ſtanding mute, and this is, 1. For the convenience of the court to be aſcertained firſt of the nature of the crime by the confeſſion or trial of the priſoner. 2. For the advantage of the priſoner, who poſſibly may be acquitted, and ſo need not the benefit of clergy: *vide Hob. Rep.* 288. *Searle & Williams.*

And for the full diſcuſſion of this matter, (which I muſt needs ſay is one of the moſt involved and troubleſome titles in the law,) I ſhall, as near as I can, hold this method. 1. To conſider ſomewhat in general touching the original and alteration of the privilege of clergy. 2. In what caſes it is to be allowed, and in what not *(a)*. 3. What perſons are capable of this privilege, and what not *(b)*. 4. At what time it is to be allowed, and when not *(c)*. 5. The manner how it is to be allowed, and who the judge of it *(d)*. 6. The conſequence of the praying or allowing of it *(e)*.

twenty-four were choſen to examine the verdict of the former; and if they were of the ſame opinion, the priſoner was ſentenced to be hanged. *Placita coronæ coram juſtic' itinerant' in comitatû* Warwicenſi *anno* 5 *H.* 3. *Rot.* 1.

" *Agnes*, quæ fuit uxor *Roberti de Boſco*, " appellat *Thomam* filium *Huberti* de morte " *Roberti* viri ſui, & *Thomas* venit, & quia " ipſa habet virum *Robertum de Verdun* " nomine, qui nullum facit appellum, ipſa " non habet vocem appellandi, & ideò in- " quiratur veritas per patriam, & *Thomas* " defendit mortem, ſed non vult ponere ſe " ſuper patriam, & xii juratores dicunt, " quòd culpabilis eſt de morte illâ, & xxiv " milites, alii a prædictis xii, ad hoc e- " lecti idem dicunt, & ideò ſuſpendatur.

Catalla *Thomæ* xxxiv. ſolidos & vi denarios, unde vicecomes reſpondebit.

Ibidem in dorſo. " *Thomas* de la *Hethe* " captus per indictamentum pro furtis & " aliis nequitiis & pro receptamento venit, " & non vult ponere ſe ſuper patriam; & " juratores dicunt ſuper ſacramentum ſuum, " quòd malè credunt eum de receptamento " *Holbæ Goligbtly*, qui fuit latro cognitus, " & poſtea ſuſpenſus apud *Caunped'em*, & " de hoc & de aliis furtis eum malè cre- " dunt, & xxiv milites ad hoc electi dicunt " idem, quod prædicti xii juratores, & " quòd latro eſt de ovibus & de averiis & " aliis rebus, & ideò ſuſpendatur.

(a) Cap. 45. 46, 47, 48, 49, 50.
(b) Cap. 51.
(c) Cap. 52.
(d) Cap. 53.
(e) Cap. 54.

For

For the firſt of theſe, namely the original and progreſs of this *privilegium clericale.*

Antiently princes and ſtates converted to chriſtianity in favour of the clergy, and for their encouragement in their offices and imployments, and that they might not be ſo much intangled in ſuits, did grant to the clergy very bountiful privileges and exemptions, principally of two kinds. 1. Exemption of places conſecrated to religious duties [324] from arreſts of crimes, which was the original of ſanctuaries. 2. Exemption of their perſons from criminal proceedings in ſome caſes capital before ſecular judges, which was the true original of the *privilegium clericale.*

The clergy increaſing in wealth, power, honour, number and intereſt, afterwards ſet up for themſelves, and that, which they obtained by the favour of princes and ſtates at firſt, they now began to claim as their right, and a right of the higheſt nature, namely *jure divino*; and by their canons and conſtitutions endeavoured, and (where they met with tame and eaſy princes and ſtates,) obtained vaſt extenſions of theſe exemptions. 1. In the perſon concerned, namely to all that had any kind of ſubordinate miniſtration relative to the church. 2. In the cauſes, exempting as far as they could all cauſes of clergymen, as well civil as criminal, from the juriſdiction of the ſecular power, and wholly ſubordinating them immediately and only to the eccleſiaſtical juriſdiction, which they ſuppoſed to be lodged firſt in the pope by divine right and inveſtitute from *Chriſt*, and from the pope ſhed abroad into all ſubordinate and eccleſiaſtical juriſdictions, whether ordinary or delegate.

And by this means they endeavoured and in ſome kingdoms and for ſome ages obtained, that there was a double ſupreme power, or two kingdoms in every kingdom, the one a *regnum eccleſiaſticum*, abſolute and independant upon any but the pope over eccleſiaſtical men and cauſes, exempt and ſeparate from the ſecular magiſtrate; the other a *regnum ſeculare* of the king or civil magiſtrate, which yet was not ſo abſolute, but that it had ſubordination and ſubjection to this *regnum eccleſiaſticum*; ſo it was *regnum ſub graviori regno.*

He that liſts to ſee the whole ſcheme of their claim, let him read *Suarez* his large diſcourſe of the *monumenta eccleſiaſtica* in his *opuſcula.*

But altho the uſurpations of the pope were very great and obtained much in this kingdom, until the extermination of his pretended ſupremacy by king *H.* 8. yet this claim of the exemption of the clergy totally

totally from ſecular juriſdiction grew ſo burdenſome and intolerable, that it was from time to time qualified and abridged by the civil power, ſometimes by acts of parliament taking it away in ſome caſes, ſometimes by the interpretation and conſtruction of the judges, and ſometimes by the contray uſage of the kingdom; for eccleſiaſtical canons never bound in *England* farther than they were received, and ſo had not their authority from their own ſtrength and obligation, but from the uſages and cuſtoms of the kingdom that admitted them, and only ſo far forth as they were ſo admitted. And therefore,

I. As to the exemption of the clergy from civil ſuits between party and party only, if upon the *diſtringas* he was returned *clericus & beneficiatus non habens laicum feodum*, proceſs iſſued to the biſhop to bring him in, and in caſe of a ſtatute merchant they were by ſpecial acts exempted from arreſts by *capias*. But yet they were not exempt from the juriſdiction of civil courts in civil cauſes, yet antiently they attempted this alſo in the king's courts but with ill ſucceſs, and ſo they never attempted it after, that I remember.

M. 7 & 8 *E.* 1. *B. R. Rot.* 13. *Cant. William Joye* plaintiff [brought an action] againſt *Guy Mortimer* rector of *Kingſton* for beating him and cutting off his upper lip with a knife, the defendant pleaded *quòd ipſe eſt clericus, & non debet hic reſpondere*, and that was all the anſwer he would give, *Et quia querela iſta non tangit vitam & membrum, ſed eſt de quâdam tranſgreſſione perſonali, nec ipſe vult in curiâ domini regis reſpondere ad querelam iſtam*, judgment was given for the plaintiff to recover 100*l.* damages taxed by the court, and [the defendant was] committed to gaol, and afterwards paid twenty marks to the king for a fine *(o)*.

II. If they were indicted in caſes criminal but not capital, nor wherein they were to loſe life or limb, there *privilegium clericale* was

(o) The record of that caſe was thus, "*Willielmus Joye* de *Kyngeſton* queritur de "*Guydone de mortuo mari*, rectore eccleſiæ "de *Kyngeſton*, & *Thomâ le Clerk* de *Ha*"*rengton* de hoc, quod *Thomas* ſimul cum "aliis ex præcepto prædicti *Guydonis* ip"ſum *Willielmum* inſultaverunt, verbera"verunt, & male tractaverunt, ita quòd "de vitâ ipſius deſperabatur; & dictus "*Guydo* manû ſuâ propriâ, & knypulo ſuo "labium ipſius *Willielmi* ſuperius abſcidit, "unde dicit quòd deterioratus eſt & damp"num habet ad valentiam centum libra"rum; & inde producit ſectam. Et præ"dicti *Guydo* & *Thomas* veniunt & dicunt, "quòd clerici ſunt, & non debent hîc re"ſpondere, & ſæpiùs quæſiti ſi velint re"ſpondere, ſemper dicunt quòd clerici "ſunt, & ſine ordinariis ſuis nolunt re"ſpondere. Et quia querela iſta non tan"git vitam & membrum, ſed eſt de quâ"dam tranſgreſſione perſonali, nec ipſi "volunt in curiâ domini regis reſpondere "ad querelam illam, conſideratum eſt, "quòd prædicti *Guydo & Thomas* de præ"dictâ tranſgreſſione convincantur, & ſa"tisfaciant prædicto *Willielmo Joye* de "dampnis, ſcilicet quilibet eorum de cen"tum libris, & domino regi de miſeri"cordiâ, & committantur gaolæ pro "tranſgreſſione &c.

not allowd them, and therefore not in indictments of treſpaſs, petty larciny, or killing *ſe defendendo*. *Stamf. P. C. fol.* 124. *a.*

III. If they were not indicted of high treaſon, clergy was not allowable, and therefore *Hill.* 2 *H.* 4. *Rot.* 4. *B. R. rex*, where the biſhop of *Carliſle* was indicted of high treaſon, and inſiſted upon his *privilegium clericale, quia epiſcopus unctus*, yet this claim was diſallowd and he put upon his trial, and convicted *(p)*.

Yet *Hill.* 17 *E.* 2. *Rot.* 87. *in dorſo, Heref. coram rege*, the biſhop of *Hereford* indicted of high treaſon for levying war againſt the king alleged, that he was *epiſcopus* Heref. *ad voluntatem Dei & ſummi pontificis*, and could not anſwer *abſque offenſâ divinâ & ſanctæ eccleſiæ*. Thereupon the plea was adjourned into parliament, where the biſhop anſwered as before, and the archbiſhop of *Canterbury* claimed him and had him; thereupon it was ordered, that day ſhould be given in the king's bench to the biſhop, and the archbiſhop was to have him there at the day, and in the mean time a writ iſſued to the ſheriff of *Heref.* to return twenty-four to inquire, as if he had pleaded, [*quòd venire faciat tot & tales, &c. ad inquirendum prout moris eſt, &c. pro quali, &c.*] returnable at the ſame day; the biſhop appeard accordingly in the cuſtody of the archbiſhop, and the jury found him guilty, *Ideo conſideratʼ eſt, quòd prædictus epiſcopus tanquam convictus &c. remaneat penes prædictum archiepiſcopum ut priùs, &c.* and all his goods and chattels, lands and tenements were ſeiſed into the king's hands by writ directed to the ſheriff: Upon which it is obſervable, 1. That a kind of allowance is made of clergy in high treaſon. 2. That notwithſtanding his claim of clergy, yet a writ iſſued to ſummon a jury, who inquired whether guilty or not. 3. That upon this plea and this inquiſition, tho he had his clergy, it was *ut clericus convictus*.

[327]

Nota in the parliament of the 1 *E.* 3. this judgment was reverſed for this cauſe, that the juſtices took the inquiſition, *licèt idem epiſcopus in aliquam inquiſitionem ſe non poſuiſſet. Clauſ.* 1 *E.* 3. *Part* I. *M.* 13. ſo that the judgment was given upon the inquiſi-

(p) The treaſon given in the record is in theſe words, "Quicumque ligeus do-"mini regis, cujuſcumque ſtatûs, ſeu con-"ditionis, ſpiritualis, vel temporalis fue-"rit, in terrâ *Angliæ* pro altâ proditione "& crimine læſæ majeſtatis indictatus eſt, "& coram rege, vel juſticiariis ſuis inde "arrenatus tenetur, & debet per legem "*Angliæ* inde reſpondere.

Yet in antient times a difference was made between treaſons, that were immediately againſt the king's perſon, and other treaſons; *vide Part* I. *p.* 185, 186. 222. *in notis*; and the caſe of the biſhop of *Hereford* here mentioned.

tion,

tion, and not upon *nihil dicit* for ſtanding mute, and therefore erroneous *(q)*.

But afterwards *T.* 21 *E.* 3. *Rot.* 23. *Hertford, rex, John Gerberge,* was indicted for a conſtructive treaſon namely, accroaching royal power, *de quo vide ſupra, Part* I. *cap.* 11. *p.* 80. 138. and thereupon claimed the privilege of clergy, *Et quia privilegium clericale in hujuſmodi caſu ſeditionis ſecundùm legem & conſuetudinem regni hactenus obtentas & uſitatas non eſt allocandum &c. quæſitum eſt ab eo ſepiùs qualiter ſe velit acquietare,* he ſtill replied, that he was a clerk, *aſſerens ſe nolle aliam reſponſionem exhibere*; and thereupon he [328] is committed to the marſhal *ad pœnitentiam ſuam ſecundùm legem & conſuetudinem regni ſubiturum &c.*

Nota clergy denied in ſuch a treaſon, yet penance awarded, tho the charge was treaſon.

Yet at common law before the ſtatute of 25 *E.* 3. *cap.* 4. *pro clero*, it ſeems that clergy was allowable to him that was indicted for counterfeiting coin, or for counterfeiting money. *B. Clergy* 1. But that is alterd by the ſtatute of 25 *E.* 3. *pro clero.*

IV. If clerks were indicted with theſe clauſes *inſidiatores viarum & depopulatores agrorum*, clergy was denied them, and therefore the act of 4 *H.* 4. *cap.* 2. was made to put theſe clauſes out of indictments and to allow clergy, if they were in the indictment.

Again, as it was denied in reſpect of ſome offenſes, ſo this *privilegium clericale* was by the common law abridged in reſpect of the perſon; for certainly by the canon laws Nuns had the exemption from

(q) The error of this judgment conſiſted not merely in its being given upon an inquiſition "in quam epiſcopus ſe non "poſuiſſet," but becauſe it was given upon an inqueſt, "in quam epiſcopus ſe non "poſuiſſet," *after he had been allowed his clergy and deliverd to his ordinary.* For the *Placita Coronæ* of thoſe times ſhew, that it was the conſtant practice of inqueſts *ex officio* to paſs upon clerks pleading their *privilegium clericale*, where clergy was allowable the method whereof was thus. The clerk upon his arraignment pleaded his *privilegium clericale*; then came the ordinary and demanded him; then a jury *ex officio* was ſummoned to inquire into the truth of the charge; or as it is expreſt in this record, "ad inquirendum, prout mo- "ris eſt, pro quali, &c. *(i. e. pro quali ei-* "*dem ordinario liberari debeat,")* and according to ſuch inqueſt, the clerk was deliverd to the ordinary as acquit, or convict. Thus are the entries upon the rolls, "*A. B.* indictatus de felonia, eò quod, "&c. & ductus coram rege, & allocutus "qualiter ſe velit de felonia prædicta ac- "quietare, dicit quòd clericus eſt, & ſine "ordinario ſuo non debet hic reſponderet "Et ſuper hoc venit *C. D.* &c. Et petit "ipſum tanquam clericum ſibi liberari; "ſed ut ſciatur pro quali eidem ordinario "liberari debeat, inquiratur rei veritas per "patriam." Then a jury *ex officio* was ſummoned, by which if it was found, "Quòd *A. B.* non eſt culpabilis, liberatur "ordinario pro tali &c." But if culpabilis "liberatur ordinario tanquam clerici "cus convictus, ſalvò cuſtodiendus, ſub "pœnâ quâ decet &c." *Vide M.* 20 & 21 *E.* 1. *Rot.* 4. *in dorſo, B. R. Hill.* 22 *E.* 1. *Rot.* 15. *Ibid. Trin.* 30 *E.* 3. *Rot.* 11. *B. R. Rex. Trin.* 31 *E.* 3. *Rot.* 15. *Ibid. Rex.*

temporal jurisdiction, but the privilege of clergy was never allowd them by our law: *vide ſtat'* 21 *Jac. (r)*.

Again, tho the ordinary took himſelf to be the judge of the allowance of the clergy and of the purgation of the clerk, yet the king's courts took that courage to make the ordinary but a miniſter, and themſelves judges of the allowance and diſallowance of the clergy and purgation. 21 *E.* 4. 21. *b.* 9 *E.* 4. 28. *a.*

And ſo the judges of the common law would oftentimes deliver the clerk to the ordinary, but *abſque purgatione*, as where the clerk is attaint by outlawry or by judgment, or convict by his own confeſſion, or upon an appeal. *Stamf. P. C. Lib.* II. *cap.* 49. 3 *H.* 7. 12. *a.* 10 *E.* 3. *Coron.* 247. *Hob. Rep.* 288. *Searle* & *Williams*, or if he were a notorious malefactor, *vide* 10 *E.* 3. *Corrn.* 247. or if he be convict by verdict of counterfeiting the ſeal or coin at common law before the ſtatute of 25 *E.* 3. *Lib. Parl.* 18 *E.* 1. *Berton*'s caſe [329] (*), or if he be committed by record to the ordinary *abſque purgatione*. *Hob. ubi ſupra.*

And in theſe caſes, if the ordinary admitted him to his purgation, he was fineable for it as a great miſdemeanor, and the party deliverd by ſuch purgation ſhall be again committed to priſon, *M.* 34 & 35 *E.* 1 *Rot.* 59. *Kanc. B. R.* the caſe of *Hugh Forſham* deliverd by *William Teſta*, and another commiſſionated from the pope *(s)*; and the entry in ſuch caſes is, *liberatur ordinario tanquam clericus convictus & utlegatus ad ſalvò cuſtodiend' periculo, quòd incumbit &c. & inhibitum eſt eidem ordinario, nè ad aliquam purgationem ipſius* A. B. *procedat domino rege inconſulto, eò quòd prædictus* A. B. *pro feloniis &c. utlegatus eſt &c. H.* 14 *E.* 3. *B. R. Rot.* 19. *Rex. Suff. Lond.* The caſe of *John de Hemmyngeſton* chaplain. But indeed, if the clerk had had his clergy and were generally deliverd to the ordinary, he might

(r) *Cap.* 28. §. 6 & 7.

(*) *Ryley's Plac. Parl. p.* 56.

(s) That caſe was thus: Whilſt the temporalities of the archbiſhop of *Canterbury* were in the king's hands, two clerks convict of felony impriſond in the archbiſhop's priſon had been admitted to purgation, and deliverd out of cuſtody by maſter *Hugh Forſham*, "Per mandatum "magiſtrorum *Willielmi Teſta*, & *Geraldi*, "clericorum papæ, adminiſtratorum ſpi"ritualitatis archiepiſcopatûs prædicti, "abſque mandato domini rogis." *Forſham* was brought *coram rege*, and arraigned for the ſaid offenſe; and the keeper of the gaol was alſo arraigned for bringing the ſaid clerks "coram præfato *Hugone* ad pur"gandum, abſque præcepto domini re"gis;" and were both convicted by their own confeſſion, and committed to the marſhal, "Et poſtea finem fecerunt pro "tranſgreſſione & contemptu prædictis." Afterwards the two clerks, who had been deliverd by ſuch purgation, were brought from the tower, where they had been impriſond by the king's writ. "Et ſeparatim allocuti qualiter de felonia prædicta ſe velint acquietare, dicunt quod clerici ſunt, & liberantur ordinario ſub "pœnâ, quâ decet, &c.

admit

admit him to make his purgation; and upon ſignification thereof by the ordinary into the chancery a writ ſhould iſſue to the ſheriff to deliver unto the party ſo purged all his goods and chattels ſeiſed into the king's hands upon that occaſion, *niſi fugam fecerit eâ occaſione.* *F. N. B.* 66. *a* And all this is to ſhew, that whatſoever weight the clergymen laid upon their canons and their exemptions from the ſecular juriſdictions, yet their canons or conſtitutions, or pretenſions or claims of this kind were not binding here, nor ſo taken farther than either by acts of parliament or the common acceptation of the kingdom they were received, and therefore theſe privileges received divers alterations and corrections and reſtrictions by the temporal judges, as the occaſion required. [330]

2 Hawk. P. C. ch. 33 per totum. 4 Blackſ. Com. ch. 28. per tot. See Index to Foſter. Tit. Clergy. Burn. Title Clergy. ſ. 2. Benefit of Clergy. 3. Peere Williams. 439—504.

CHAP. XLV.

In what offenſes *clergy is allowable or not.*

NOW touching the offenſes, wherein clergy is or was allowable, and in what not.

There are theſe general rules, that have influence in this whole diſcourſe.

1. That in caſe of high treaſon againſt the king clergy was never allowable in this kingdom.

2. That at common law in all caſes of felony or petit treaſon clergy was allowable, excepting two.

3. That where a ſtatute makes a new felony, clergy is incident thereunto, unleſs it be ſpecially taken away by acts of parliament; but where it makes a new treaſon, there is no clergy.

Upon theſe generals much of the ſucceeding buſineſs of this chapter, and ſome that follow will be built.

I. As to the firſt of theſe I ſay generally in all caſes of high treaſon clergy was never allowd.

And this propoſition will be conſiderd two ways. 1. How the common law ſtood before the ſtatute of 25 *E.* 3. *pro clero*, and 2. How it ſtood after.

The ſtatute of 25 *E.* 3. *for the clergy* was made in the parliament held in *Hill.* 25 *E.* 3. which was in the ſame parliament, wherein the ſtatute of declaration of treaſon is made, commonly called the *The ſtatute of purveyance.*

By this ſtatute *pro clero cap.* 4. it is enacted, " That all manner of
[331] " clerks, as well ſecular as religious, which ſhall be from
" henceforth convict before ſecular judges for any treaſons
" or felonies touching other perſons than the king himſelf or his
" royal majeſty, ſhall from henceforth have and enjoy the privilege
" of holy church, and ſhall be without impeachment or delay de-
" liverd to the ordinaries demanding them, and upon this the arch-
" biſhop promiſeth, that upon the puniſhment and ſafe keeping of
" ſuch clerks offenders, which ſhall be deliverd to the ordinaries, he
" ſhall thereof make a convenient ordinance, whereby they ſhall be
" ſafely kept and duly puniſhed, ſo that no clerk ſhall take courage
" to offend for default of correction.

At the ſame parliament it was declared what was treaſon, and among the reſt counterfeiting the great or privy ſeal, or the king's coin is declared treaſon, and put in the ſame rank with compaſſing the king's death or levying of war, and it is thereby enacted, " That no " other offenſes, than what are therein declared, be treaſon till de- " clared by parliament.

Before this ſtatute there were two ſorts of treaſons, that concerned the king, one was of a greater note, and another of a leſs note.

Thoſe of the greater note were *conſpiring the king's death, levying of war againſt the king, adhering to his enemies*, and two others, that are ſince abrogated by the ſtatute of 25 *E.* 3. which came under the general and obſcure names of *ſedition*, and *accroaching of royal power.*

In any of theſe a party convict had not his clergy at common law, this appears by the judgment cited in the former chapter *(a)*. *T.* 21 *E.* 3. *B. R. Rot.* 23. *Rex.*

But there were other treaſons, that concerned the king, which were of an inferior note, namely *counterfeiting the ſeal* and *counterfeiting the coin* and theſe, (the latter eſpecially,) had only judgment as in caſe of petit treaſon, namely to be drawn and hanged.

And it ſeems before the ſtatute of 25 *E.* 3. *de proditionibus* clergy was allowd in both caſes, as appears by the old book of *E.* 3. *B. R.*

(a) p. 327. *Gerberge's* caſe.

title

title *Clergy, placito ultimo*, and the judgment in parliament of 18 *E.* 1. in *Berton*'s caſe, who being convict for counterfeiting the king's ſeal had his clergy, but *tradatur ordinario ſine purgatione (b).*

But now as to the ſtatute of 25 *E.* 3. *pro clero*, and the ſtatute of 25 *E.* 3. at the ſame parliament *de proditionibus* laying them both together in all caſes of treaſon touching the king himſelf or his royal majeſty clergy is wholly taken away, and in all other caſes of treaſon or felony clergy is allowd; and conſequently in murder, robbery, petit treaſon clergy is ſettled by this act of parliament.

But whatſoever is declared treaſon againſt the king by the ſtatute of 25 *E.* 3. *de proditionibus*, as well counterfeiting the ſeal or the money of the kingdom, as any other treaſon therein declared, is wholly exempted from clergy. • 19 *H.* 6. 47. *b. Stamf. P. C. Lib.* II. *cap.* 42. *fol.* 124. *a. M.* 31 *E.* 3. *coram rege Rot.* 18. *Rex, in dorſo, Bucks, caſus abbatis de Muſſenden (c) pro reſecatione & falſificatione legalis monetæ*, 24 *H.* 8. *Spelman*'s *Rep. accordant adjudge.* 2 *Co. Inſtit.* 635, 636. *ſuper Artic' cleri.*

So that at this day in all caſes of high treaſon, whether thoſe declared by the ſtatute of 25 *E.* 3. *de proditionibus*, or any other treaſons newly enacted ſince, the privilege of clergy is wholly taken away; and, (which is the ſecond propoſition above mentiond.)

II. In all felonies, that were at common law before the ſtatute of 25 *E.* 3. *pro clero*, and in all caſes of petit treaſon by that ſtatute the privilege of clergy is reſtored and ſettled.

And therefore in all ſuch felonies or petit treaſons, which were ſuch at the time of the ſtatute of 25 *E.* 3. *cap.* 4. *pro clero* clergy is allowable, unleſs in ſuch caſes where it is taken away by ſubſequent acts of parliament, and ſo far forth only as the ſame is ſo taken away.

But in what caſes ſubſequent acts of parliament have taken away clergy, where at the time of the ſtatute of 25 *E.* 3. it was allowable, ſhall be the buſineſs of the next chapter.

But yet there ſeem to be two felonies, where clergy was [333] not allowable notwithſtanding this act, namely certain acts, that by interpretation of law were hoſtile acts, which was the reaſon, that I long ſince heard Mr. *Noy* then the king's attorney give for it

(b) *Vide ſupra p.* 328. See alſo *Part* I. *p.* 185, 186. *in notis, & p.* 223. *in notis.* (c) *Part* I. *p.* 216.

in the king's bench about 7 *Car.* 1. *viz.* 1. *Inſidiato viarum & depopulatio agrorum.* 2. Wilful burning of houſes.

1. Concerning the former of theſe it appears, that *inſidiatores viarum* and *depopulatores agrorum* were ouſted of their clergy notwithſtanding the ſtatute of 25 *E.* 3. *cap.* 4. *pro clero.*

Rot. Parl. 4 *H.* 4 *n.* 30. there was a complaint in parliament by the archbiſhop of *Canterbury* and clergy, whereupon it was enacted, that *that* general clauſe ſhould be left out in indictments and words of the ſame effect inſerted, and that notwithſtanding the indictment carried the ſame effect, yet benefit of clergy ſhould not be denied, as appears at large by the ſtatute of 4 *H.* 4. *cap.* 2.

2. As touching wilful burning of houſes I have heard, as before, that clergy was not allowable by the common law, but of this more fully in the next chapter.

Now touching *ſacrilege* tho ſome later ſtatutes were made to ouſt clergy in that crime, yet it ſeems at common law or at leaſt after the ſtatute of 25 *E.* 3. *cap.* 4. *pro clero* it was allowable, as appears 26 *Aſſiz.* 27. where it is agreed by the juſtices, that a perſon indicted of robbing a chapel and breaking a church ſhould have his clergy; but it ſeems, it was with this difference, that if the ordinary refuſed him, as he might, he ſhould not have his clergy. 20 *E.* 2. *Coron.* 283. *Stamf. P. C.* 123, 124, but otherwiſe the court would allow it him. 26 *Aſſiz.* 27.

See the references at the end of Ch. XLIV. ante.

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[334] CHAP. XLVI.

Where and in what offenſes, *that where capital at common law*, clergy is taken away *in part or in all by acts of parliament ſubſequent to* 25 E. 3. *and firſt, of* petit treaſon.

I HAVE before declared what capital offenſes were exempt from clergy at common law, and how the law ſtood in relation thereunto before and by the ſtatute of 25 *E.* 3. and have there ſettled it, that regularly in all capital offenſes, except treaſons, which touch the king, the offender is to have the privilege of his clergy.

But

But as touching treaſons, that touch the king, by virtue of the common law and the declaration of that ſtatute the benefit or privilege of clergy is not allowable, neither is there any ſtatute, that hath altered the law in that point of treaſon, but it ſtands ſtill excluded from the privilege of clergy.

But as to petit treaſon and felonies ſubſequent ſtatutes have made great alterations as to the point of clergy from what was declared by the ſtatute of 25 *E.* 3. *cap* 4. *pro clero.*

The inquiry therefore touching the alterations made by ſubſequent ſtatutes in point of petit treaſon and felony may be conſiderd in this method.

1. What alterations have been made by acts of parliament in relation to new felonies made by acts of parliament ſince 25 *E.* 3. And

2. What alterations have been made in ſuch offenſes, as were petit treaſon or felony at the time of the making of that ſtatute.

I. As to the former of theſe this general rule holds, that if an act of parliament make a felony, and doth not take away clergy in expreſs words, in all thoſe caſes clergy is allowable. [335]

And if it doth make a felony and takes away clergy not generally, but in ſuch or ſuch caſes, regularly in other caſes clergy is allowable, as if it takes away clergy in caſe the party be convicted by verdict, yet he ſhall have his clergy, if he ſtand mute.

But if it enacts generally, that it ſhall be felony without benefit of clergy, or that he ſhall ſuffer as in caſe of felony without benefit of clergy, this excludes it in all circumſtances, and to all intents; and becauſe I have before in the particular enumeration of felonies by act of parliament taken notice all along what are excluded of clergy and what not, I ſhall diſmiſs that part of the inquiry referring myſelf to the ſeveral acts of parliament, that enact the felonies themſelves; and ſhall proceed to the ſecond part of the inquiry.

II. Therefore as to thoſe felonies, that were ſuch at the time of the ſtatute of 25 *E.* 3. *cap.* 4. *pro clero.*

I ſhall firſt deliver ſome general poſitions, and then proceed to the particular felonies themſelves.

1. Therefore it is certain, that whatſoever petit treaſon or felony there was at the time of the making of that ſtatute, it was within the privilege of clergy by force of that ſtatute at leaſt, except thoſe two above mentiond in the laſt chapter.

2. That

2. That therefore all ſuch petit treaſons and felonies are at this day within clergy, unleſs where it is ouſted by ſubſequent ſtatutes now in force.

3. That where any ſtatute ſubſequent to 25 *E.* 3. *cap.* 4. hath ouſted clergy in any of thoſe felonies, it is only ſo far ouſted, and only in ſuch caſes and as to ſuch perſons as are expreſly compriſed within ſuch ſtatutes, for *in favorem vitæ & privilegii clericalis* ſuch ſtatutes are conſtrued literally and ſtrictly.

And therefore, if clergy be ouſted as to the principal, it is not ouſted as to the acceſſary; if as to the acceſſary *before*, it is not extended to the acceſſary *after*; if where the priſoner is convict by ver-
[336] dict, it holds not as to a conviction by confeſſion, nor as to an attainder by outlawry, nor to a ſtanding mute, as we ſhall ſee in the ſubſequent inſtances.

4. That in all caſes, where a ſubſequent act of parliament ouſteth clergy in caſe of any felony, the indictment muſt preciſely bring the party within the caſe of the ſtatute, otherwiſe, altho poſſibly the fact itſelf be within the ſtatute, and it may ſo appear upon the evidence, yet if it be not ſo alledged in the indictment, the party, tho convict, ſhall have his clergy. *Stamf. P. C. fol.* 130. *a. Dy.* 99. *a.* 183. *b.* 224. *b.* 261. *a.*

5. Altho the caſe be ſo laid in the indictment, that it comes within the ſtatute to exempt the priſoner from clergy, yet if upon the evidence it fall out that, tho it be a felony, yet it is not ſo qualified, as laid in the indictment, the jury ought to find him guilty of the felony ſimply, but not as to the manner laid in the indictment, (as for inſtance guilty of the felony, but not of the robbery, or not of the breaking of the houſe,) and thereupon the priſoner ſhall be admitted to his clergy; and this is commonly done.

And now I come to the particular offenſes, wherein clergy is taken away from ſuch felonies, where by the common law and the ſtatute of 25 *E.* 3. *cap.* 4. it was allowable.

And thoſe offenſes are theſe that follow.

1 Petit treaſon. 2. Murder. 3. Manſlaughter. 4. Rape. 5. Robbery. 6. Burglary. 7. Larciny of ſeveral kinds and degrees.

And I ſhall now purſue them in the ſame order, as they are ſet down.

Firſt, Petit treaſon, as the ſervant killing his maſter, &c.

It

It is plain, that after the ſtatute of 25 *E.* 3. *cap.* 4. clergy was to be allowd until 12 *H.* 7. *cap.* 7. & 23 *H.* 8. *cap.* 1.

The firſt ſtatute, that ouſted clergy generally in petit treaſon, was that of 12 *H.* 7. *cap.* 7. which yet extended but to conviction or attainder, and only to the principal not to the acceſſary.

By the ſtatute of 23 *H.* 8. *cap.* 1. it is enacted, "That no [337] "perſon, which ſhall be found guilty after the laws of the "land for any manner of petit treaſon, or wilful murder of malice pre- "penſed, or for robbing any churches, chapels, or other holy places, or "for robbing any perſon or perſons in their dwelling houſe or dwelling "place, the owner or dweller of the ſame houſe, his wife, children, "or ſervants then being within, and put in fear or dread by the ſame, "or for robbing any perſon or perſons in or near the highways, or "for wilful burning of any dwelling houſes or barns, wherein any "corn or grain ſhall happen to be, nor any perſon found guilty of "any abetment, procurement, helping, maintaining or counſelling of "or to any ſuch petit treaſons, murders or felonies ſhall from hence- "forth be admitted to the benefit of clergy, except clerks in holy "orders, *viz.* in the order of ſubdeacon or above; and that ſuch "perſons in orders convict of thoſe offenſes ſhall be delivered to "the ordinary, but ſhall remain in priſon without purgation, unleſs "he become bound by recogniſance before the king's juſtices, "where he was convict, with two ſufficient ſureties for his good "behaviour.

"Perſons attaint by judgment upon confeſſion, outlawry, or verdict "admitted to clergy to remain in priſon without purgation.

"Clerks convict, and upon their clergy allowd deliverd to the ordi- "nary may be degraded, and then ſent into the king's bench by the "ordinary to receive judgment upon their conviction, and the juſtices "having the record before them ſhall give judgment upon ſuch con- "viction, as if had not had clergy.

This act, tho temporary, was continued by the ſtatute of 28 *H.* 8. *cap.* 1. and made perpetual by 32 *H.* 8. *cap.* 3. and by the ſame act perſons in orders are put into the ſame condition, as other perſons not in orders, notwithſtanding this ſtatute of 23 *H.* 8. *cap.* 1. or 25 *H.* 8. *cap.* 3.

This ſtatute of 23 *H.* 8. as to all theſe crimes extended to principals and acceſſaries before the fact, but not to acceſſaries after.

But

But yet it extended to exclude principals and acceſſaries *before*, only in caſes where they were found guilty after due courſe of law, *viz.* by verdict or confeſſion, *&c.* and extended not to ſtanding mute, *&c.* And therefore by the ſtatute of 25 *H.* 8. *cap.* 3. it is enacted, "That "every perſon that ſhall be indicted of petit treaſon, wilful burning "of houſes, murder, robbery, or burglary, or other felony according "to the tenor or meaning of the ſaid ſtatute of 23 *H.* 8. and there- "upon arraigned do ſtand mute of malice or froward mind, or chal- "lenge peremptorily above the number of twenty, or do not anſwer "directly to the indictment and felony, whereof he ſhall be ar- "raigned, ſhall be excluded from clergy in like manner, as if he had "pleaded to the offenſe and been found guilty according to the laws "of the land.

And provides, "That if any perſon be indicted in a foreign county "for ſtealing of goods in another county, and be found guilty, ſtand "mute, challenge above twenty peremptorily, or will not directly "anſwer, he ſhall be excluded from clergy, as he ſhould have been, "if he had been arraigned for the robberies or burglaries in the "ſame ſhire where they were done; if by examination it ſhall ap- "pear to the juſtices, that he had been indicted and arraigned in "the county where the burglary was done, he ſhould have been ex- "cluded from his clergy by the ſaid ſtatute, had he been found "guilty there.

This ſtatute was but temporary, becauſe bottomed upon the ſtatute of 23 *H.* 8. *cap.* 1. that was but temporary, but by the ſtatute of 28 *H.* 8. *cap.* 1. was continued till the laſt day of the next parliament, and by the ſtatute of 32 *H.* 8. *cap.* 3. made perpetual.

But hitherto in this caſe of petit treaſon, (and indeed generally in all theſe caſes of the ſtatute of 23 *H.* 8.) there were theſe defects.

1. That as to the principal the ſtatute of 23 *H.* 8. *cap.* 1. did extend to appeals, as well as indictments for the offenſes deſcribed in that ſtatute, and if they were found guilty by verdict or confeſſion, the appellee and acceſſary *before* were excluded of clergy, but
[339] ſtatute of 25 *H.* 8. *cap.* 3. extended only to indictments, and therefore an appellee ſtanding mute, *&c.* was to have his clergy in the caſes of the ſtatute of 25 *H.* 8. *cap.* 3. Again,

2. Neither of theſe ſtatutes extend, where the party is outlawd for theſe crimes.

3. As

3. As the law was then taken, challenging above twenty had been a conviction, or at leaſt had put the party to his penance; but that I may obſerve it once for all, now that clauſe of challenging above twenty mentiond in the ſtatute of 25 *H.* 8. and other ſtatutes hereafter mentiond imports nothing as to the point of clergy, for his challenge is over-ruled and he put upon the jury, as hath been before obſerved (*).

But becauſe the ſtatute of 1 & 2 *P. & M. cap.* 10. in caſe of petit treaſon reſtores the peremptory challenge of thirty-five, it ſhould ſeem, that if he challenge peremptorily above thirty-five, he ſhall have the benefit of his clergy, for it is now become *caſus omiſſus*.

And therefore by the ſtatute of 4 & 5 *P. & M. cap.* 4. "If "any ſhould malitiouſly command, hire or counſel any to commit "petit treaſon, wilful murder, or to do any robbery in any dwelling "houſe or houſes, or to do any robbery in or near the highway, or "to burn any dwelling houſe or any part thereof, or any barn then "having any corn or grain in the ſame, then every ſuch offender, "1. Being outlawd for the ſame, or 2. Arraigned and found guilty "by order of law, or 3. Otherwiſe lawfully convict or attaint of "the ſame, or 4. Who ſhall ſtand mute of malice or froward mind, "or 5. Shall peremptorily challenge above twenty perſons, or 6. "Will not directly anſwer, is ouſted of his clergy.

But *nota*, every indictment to ouſt the acceſſary *before* of his clergy muſt run *malitiosè*, otherwiſe he ſhall have his clergy. 2 *Eliz. Dy.* 183. *b.*

But now by the ſtatute of 1 *E.* 6. *cap.* 12. it is enacted, "That "no perſon, that hath been, or ſhall be in due form of law attaint "or convict of murder of malice prepenſed, or of poiſoning [340] "of malice prepenſed, or breaking any houſe by day or by "night, any perſon being then in the houſe, where the ſame break-"ing ſhall be committed, and thereby put in fear or dread, or of or "for robbing any perſon or perſons in or near the highways, or for "felonious ſtealing of horſes, geldings or mares, or for felonious "taking goods out of any pariſh church or other church or chapel, "or being indicted or appeald of any of the ſaid offenſes, and there-"upon found guilty by twelve men, or ſhall confeſs the ſame upon "his or their arraignment, or will not anſwer directly according to "the laws of this realm, or ſhall ſtand wilfully or of malice mute,

(*) *p.* 270.

"ſhall

" ſhall be admitted to have the privilege of clergy or ſanctuary, but " ſhall be put from the ſame, and that all perſons in all other caſes " of felony, other than ſuch as are before mentiond, which ſhall be " arraigned or found guilty upon their arraignment, or ſhall not con- " feſs the ſame, or ſtand mute, or will not directly anſwer, ſhall have " and enjoy the benefit of clergy and ſanctuary, as they might have " had before the 24th of *April* 1 *H.* 8.

This ſtatute doth not reſtore clergy to the principal in caſe of petit treaſon, but leaves the law in relation thereunto, as it ſtood before; and upon the ſtatutes of 23 & 25 *H.* 8. tho there be no word of *petit treaſon*, for if the opinion of *Walſh* and my lord *Dyer M.* 6 & 7 *Eliz. Dy.* 235. *a.* be law, *viz.* that a general pardon of all offenſes except murder, doth not except petit treaſon, and ſo petit treaſon comes not within the expreſſion of *felony*, then the clauſe, *that in all other caſes of* felony *clergy ſhall be allowd*, doth not extend to allow clergy in petit treaſon.

But if that opinion be not law *(a)*, (as I think it is not) then the excluſion of clergy from murder by this ſtatute excludes it alſo in petit treaſon.

But if it did not, yet it does not reſtore clergy in petit treaſon to the [341] principal *(b)*, where found guilty or attaint, becauſe before 1 *H.* 8. clergy was taken away in petit treaſon from the principal by 12 *H.* 7. *cap.* 7.

Again, by the ſtatute of 5 & 6 *E.* 6. taking notice, that by the act of 1 *E.* 6. the act of 25 *H.* 8. *cap.* 3. touching robbers and burglars arraigned in a foreign county, and ouſting them of clergy by examination ſtands repeald, whereby offenders were much emboldened, it is enacted, " That the ſaid act made in the 25th year of King " *H.* 8. touching the putting ſuch offenders from their clergy, [and " every article, clauſe and ſentence contained in the ſame touching " clergy] ſhall from henceforth touching ſuch offenſes from hence- " forth to be committed or done ſtand, remain, and be in full ſtrength " and virtue in ſuch manner, as it did before the making of the ſaid " act in the ſaid firſt year of King *E.* 6. any clauſe, article or ſen- " tence compriſed in the ſaid act of 1 *E.* 6. to the contrary thereof " notwithſtanding.

(a) Vide ſupra, Part I. *cap.* 29. *p.* 378.

(b) The words here in the original MS. are [*takes not away clergy from the principal,*] but the ſcope of our author's argument plainly ſhews he intended to have wrote [*does not reſtore*].

Now

Now upon this act of 5 *E.* 6. *cap.* 10. it hath been taken, that not only the clauſe of the act of 25 *H.* 8. *cap.* 3. touching foreign felonies ouſted of clergy upon examination, but the whole act of 25 *H.* 8. *cap.* 3. is re-enacted, and upon that account wilful burning ſtands by virtue of that act ouſted of clergy, becauſe ouſted of clergy by 23 & 25 *H.* 8. tho no mention be made thereof in the ſtatute of 1 *E.* 6. and accordingly reſolved 11 *Co. Rep.* 33. *Alexander Poulter's* caſe, *de quo infra.*

Upon the whole matter it ſeems plain, that at this day in relation to petit treaſon the law ſtands thus.

1. The principal convict by verdict or confeſſion is ouſted of clergy by 23 *H.* 8. *cap.* 1. both in appeals and indictments.

2. The principal ſtanding mute, or not directly anſwering is ouſted of clergy by 25 *H.* 8. *cap.* 3. in caſes of indictment, but not in caſe of an appeal; and the ſtatute of 1 *E.* 6. *cap.* 12. doth not alter the caſe as to the principal in petit treaſon.

3. Yet I ſee no proviſion to ouſt clergy of a clerk attaint of petit treaſon by outlawry, but that he may claim his clergy and be deliverd to the ordinary, as a clerk attaint without purgation, for this is not provided for, as it ſeems by theſe ſtatutes. [342]

4. But in my opinion the ſtatute of 1 *E.* 6. *cap.* 12. taking away clergy from perſons attaint, as well as from perſons convict of murder doth extend to petit treaſon, which is in truth murder, and conſequently a perſon outlawd of petit treaſon, tho not by the ſtatutes of 23 or 25 *H.* 8. yet the ſtatute of 1 *E.* 6. is exempt from clergy under the name of wilful murder *(c)*.

And the ſtatute of 4 & 5 *P.* & *M. cap.* 4. taking away clergy from acceſſary *before* in caſe of petit treaſon, where attainted by outlawry, had committed a great piece of abſurdity in putting the acceſſary in a worſe caſe than the principal, unleſs the law had been taken, that the ſtatute of 1 *E.* 6. *cap.* 12. had taken it away from the principal in the like caſe of outlawry, which is an attainder in law.

5. As to the acceſſary before the fact, he is ouſted of clergy in all the caſes before mentiond by the ſtatute of 4 & 5 *P.* & *M. cap.* 4. and ſo the law ſtands at this day, but it muſt be laid *malitiosè*. 2 *Eliz. Dy.* 183. *b.*

(c) If this ſtatute be conſtrued to take away clergy from petit treaſon, it takes it away, as well in caſe of an appeal, as of an indictment, not only where the party is convict by verdict or confeſſion, but alſo where he will not anſwer directly, or ſhall ſtand wilfully mute.

6. But

6. But the acceſſary after the fact hath his clergy in all caſes in petit treaſon, for no ſtatute takes it from him.

I have been the longer in this, becauſe it was neceſſary to take notice of the ſeries of all the ſtatutes, and to diſintangle them, and it will ſerve for the briefer collection of what follows in other caſes.

See the references at the end of ch. XLIV. ante.

[343]

CHAP. XLVII.

Concerning the alteration made by ſeveral ſtatutes *in* caſes *of* murder, manſlaughter, rape, *and* wilful burning *of houſes or barns with corn.*

I. I Shall briefly conſider how the privilege of clergy ſtands as to *murder*, and therein.

1. At the common law, and by the ſtatute of 25 *E.* 3. *cap.* 4. clergy was to be allowed as well in murder, as any other felony.

2. Tho there were ſome particular ſtatutes, that in particular caſes took away clergy in caſe of heinous murders (*), yet the firſt general law, that took away clergy in caſe of wilful murder *ex malitiâ præcogitatâ* generally was 23 *H.* 8. *cap.* 1. which extended only to a conviction by verdict or confeſſion, and included acceſſaries *before*, and extended to appeals, as well as indictments.

3. The ſtatute of 25 *H.* 8. *cap.* 3. extended only to indictments but not to appeals; to principals and not to acceſſaries *before* or after.

4. But the ſtatute of 1 *E.* 6. *cap.* 12. took away clergy from principals in murder in all caſes, *viz.* conviction by verdict or confeſſion, attainder by outlawry or otherwiſe, ſtanding mute, or not directly anſwering *(a)*, but this ſtatute of 1 *E.* 6. extended not to acceſſaries.

[344] 5. By the ſtatute of 4 & 5 *P.* & *M. cap.* 4. all that ſhall malitiouſly command, hire, or counſel any to commit any wilful murder are ouſted of clergy in all caſes.

(*) *Vide* 12 *H.* 7. *cap.* 7. 4 *H.* 8. *cap.* 2. 22 *H.* 8. *cap.* 9.

(a) This ſtatute omits the caſe of challenging above twenty, but this our author thinks unneceſſary to be inſerted, becauſe ſince 22 *H.* 8. *cap.* 14. neither penance nor judgment of death is to follow in that caſe, but only the challenge is to be overruled, *vide ſupra p.* 270. & *infra cap.* 48. however this omiſſion is ſupplied by 3 & 4 *W.* & *M. cap.* 9. as to indictments.

6. But

6. But acceſſaries to murderers after the fact have their clergy in all caſes.

So that the principal ſtands at this day ouſted of clergy in all caſes, and the acceſſary *before* is alſo ouſted of clergy in all caſes, but the acceſſary *after* is in no caſe ouſted of clergy.

But it muſt be remembered, that the party indicted muſt be brought within the very letter of the ſtatute.

If the indictment be *felonicè & ex malitiâ ſuâ præcogitatâ interfecit*, yet he ſhall have his clergy, becauſe there wants the word *murdravit*. *Dy* 261. *a.*

So if it be *felonicè interfecit & murdravit*, and ſays not *ex malitiâ ſuâ præcogitatâ*, it is but an indictment of manſlaughter, and the priſoner ſhall have his clergy.

So if a man be indicted, as acceſſary before, *viz. quòd præcepit*, and ſays not *malitiosè præcepit*. *P.* 2 *Eliz. Dy.* 183. *b.*

II. As to *manſlaughter*, regularly in all caſes the perſon indicted or appealed ought to be admitted to his clergy.

But if *A. B.* and *C.* be indicted ſpecially upon the ſtatute of 1 *Jac. cap.* 8. ſetting forth, (as the indictment muſt) "That *A. felonicé pu-* "*pugit & percuſſit D.* not having any weapon drawn, nor having "ſtricken firſt, and that *B.* and *C.* were preſent, aiding and abetting," tho *A. B.* and *C.* are all principals in manſlaughter at common law, yet *A.* only, that gave the ſtroke, ſhall be ouſted of his clergy. *H.* 23 *Car.* 1. *B. R. Page's* caſe. *(b)*.

And therefore it ſeems in that caſe, if it be found, that *A.* gave not the ſtroke, but *B.* and that *A.* and *C.* were aiding and abetting, not only *A.* and *C.* that gave not the ſtroke ſhall have their clergy, but alſo *B.* becauſe, tho the caſe of *B.* is within the ſtatute, yet as to him the indictment brings him not within the ſtatute, and ſo differs from the caſe of a general indictment of murder, where tho it be laid, that *A.* gave the ſtroke, and *B.* was preſent, aiding and abetting, yet if upon the evidence it appears, that *B.* gave the ſtroke, [345] and *A.* was abetting, *&c.* both ſhall be convict of murder, for both are equally murderers, and the indictment is true as to both *quòd ex malitiâ ſuâ præcogitatâ interfecerunt & murdraverunt* (*).

By the ſtatute of 1 *Jac. cap.* 8. clergy is ouſted as to him that ſo ſtabs upon any conviction by verdict, confeſſion or otherwiſe, and that as well in caſe of an appeal as of an indictment; but it extends

(*b*) *Styl.* 86. (*) *Vide ſupra p.* 292. 1 *Salk.* 334.

not to ſtanding mute or not directly anſwering, for there is no conviction in that caſe, and ſo it ſeems as to an outlawry *(c)*.

III. As to *rape*, by the ſtatute of 18 *Eliz. cap.* 7. If any man be convict thereof by verdict or confeſſion, or be outlawd for the ſame, he is excluded of clergy, but this act extends not to a ſtanding mute or not directly anſwering, for this is *caſus omiſſus (d)*, and he ſhall have his clergy 11 *Co. Rep.* 35. *b Poulter's* caſe.

But at this day in all caſes challenging above twenty makes nothing either for or againſt clergy, for the party ſhall not be put to his penance nor be convict thereupon, but only his challenge ſhall be over-ruled and he put upon his trial, as hath been before obſerved (†), and therefore the clauſe in the act of parliament ouſting clergy, where he challengeth above twenty, or the not mentioning of that clauſe makes nothing at this day one way or another as to the point of clergy.

But neither acceſſaries *before* or *after* are upon this ſtatute exempt from the privilege of clergy.

IV. As to the caſe of *wilful burning*.

It ſtands now a ſettled point, that if the principal be convict by verdict or confeſſion, or ſtand mute, or will not directly anſwer, he ſhall not have his clergy, this is the point reſolved 11 *Co. Rep.* 35. *a. Poulter's* caſe, and the conſtant practice is, and always hath been accordingly.

[346] And the ſtatute of 4 & 5 *P. & M. cap.* 4. ſtrongly proves the law to be ſo, for clergy is taken away from the acceſſary *before*, and it were a ſtrange overſight, if an act of parliament ſhould exempt the acceſſary from clergy in this caſe, and yet the principal ſhould have the benefit of it.

That which cauſed the doubt was the ſtatute of 1 *E.* 6. *cap.* 12. where it enumerates all the offenſes, which were then to be exempt from clergy, and mentions not the caſe of wilful burning and enacts, "That in all other caſes of felony the offenders ſhall have clergy, as "they ſhould have had before 1 *H.* 8." and the firſt ſtatute that took away clergy from wilful burning of houſes or barns with corn was a ſtatute made after 1 *H.* 8. *viz.* 23 *H.* 8. *cap.* 1. & 25 *H.* 8. *cap.* 3.

There have been three anſwers given hereunto (*), *viz.*

(c) But in all theſe caſes the offender is excluded from clergy by 3 & 4 *W. & M. cap.* 6. upon an indictment, but not in an appeal.

(d) But this is provided for in caſe of an indictment by 3 & 4 *W. & M. cap.* 9.

(†) *p.* 270.

(*) *Vide Part* I. *p.* 570, *&c.*

1. That

1. That this was a felony, that even by the common law before 1 *H.* 8. was exempt from clergy, being an act of hoſtility, and this I remember was given by *Noy* attorney general about 8 *Car.* 1. but poſſibly this may be doubtful as to the fact, whether at common law clergy were not allowable upon this offenſe, and if it were not, yet it is a greater doubt, whether that law were not altered by the act of 25 *E.* 3. *cap.* 4. *pro clero*, wherein clergy was ſettled in all caſes, except treaſons or felonies, that touch the king or his royal dignity.

2. Others have agreed, that clergy was taken away in theſe caſes of wilful burning by the ſtatutes of 23 *H.* 8. *cap.* 1. and 25 *H.* 8. *cap.* 3. and conſequently this offenſe not being enumerated in the ſtatute of 1 *E.* 6. *cap.* 12. is by the general concluding clauſe of that ſtatute reſtored to the benefit of clergy: But then they think, that by the ſtatute of 5 & 6 *E.* 6. *cap.* 10. the ſtatute of 25 *H.* 8. *cap.* 3. is wholly revived, and conſequently now the repeal of the exemption of clergy in caſe of wilful burning is repealed by the revival of the ſtatute of 25 *H.* 8. *cap.* 3. by the ſubſequent ſtatute of 5 & 6 *E.* 6. *cap.* 10. and thereby exemption from clergy in caſe of wilful burning is again eſtabliſhed.

But this hath in it many difficulties. 1. It ſeems by the whole ſcope of the preamble and the ſtrict penning of the [347] body of the act of 5 & 6 *E.* 6. *cap.* 10. that *that* act revived only ſo much of the act of 25 *H.* 8. *cap.* 3. as concerns the ouſting of felons of their clergy upon examination, where robberies or burglaries were committed in foreign counties. 2. Again, the ſtatute of 25 *H.* 8. took away clergy from wilful burning, only in caſes of indictment, and that only where the priſoner ſtands mute, anſwers not directly, or challengeth above twenty, but the ouſting of clergy in caſe of appeals, as well as indictments upon conviction by verdict or confeſſion ſtood purely upon the ſtatute of 23 *H.* 8. *cap.* 1. which is no where revived as to the point in queſtion, and yet that is the caſe, that muſt moſt ordinarily occur, namely, where the party is convict.

3 Therefore the laſt and I think the ſureſt anſwer as to this difficulty is, that the ſtatute of 3 & 4 *P.* & *M.* *cap.* 4. taking away clergy in all caſes from him that malitiouſly commands, hires, or counſels the wilful burning of any dwelling-houſe or barn with corn, in all caſes of conviction, attainder, ſtanding mute, outlawry, peremptory challenge of above twenty, or not directly anſwering, doth by neceſſary conſequence take away clergy in all theſe caſes from the principal offender in ſuch wilful burning.

But *quâcunque viâ datâ* the law ſtands ſettled, that clergy is taken away in all caſes from the principal in wilful burning of a dwelling-houſe or a barn with corn, *quod vide* 11 *Co. Rep. Alexander Poulter's* caſe *per totum.*

And therefore I can by no means think, that outlawry of the principal in this offenſe is within the privilege of clergy, for the acceſſary even in that inſtance is exempt from *(e)* clergy by 4 & 5 *P. & M. cap.* 4.

Now as touching the acceſſary by the ſtatute of 4 & 5 *P. & M.* [348] *cap.* 4. they that ſhall malitiouſly command, hire, or counſel this fact, *viz.* acceſſaries *before*, are exempt from the benefit of clergy in all caſes.

But acceſſaries *after* are within the benefit of clergy in all caſes.

See the references at the end of ch. XLIV. ante.

CHAP. XLVIII.

Concerning clergy in robbery from the houſe, *or* robbery from the perſon.

ROBBERY is of two kinds, from the perſon, and from the houſe of another.

Firſt, Robbery from the perſon is a violent aſſault upon the perſon, and felonious and violent taking away his goods putting him in fear.

The principal in caſe of robbery in or near the highway is ouſted of his clergy, *viz.*

1. By the ſtatute of 23 *H.* 8. *cap.* 1. "Where he is convicted by "verdict or confeſſion, whether it be in an appeal or an indictment.

2. By the ſtatute of 25 *H.* 8. *cap.* 3. "In an indictment, where "the party ſtands mute, will not directly anſwer, or challengeth "above twenty

And in caſe the robbery were in or near the highway in the county of *A.* and he carry the goods into the county of *B.* and there be indicted of larceny, and upon examination it appears it was ſuch a rob-

(e) The MS. has it [*is ſubject to*] but both the ſtatute and the ſenſe require it ſhould be [*is exempt from.*]

bery

bery in the county of *A.* that had he been indicted in the county of *A.* he ſhould have been ouſted of his clergy by the ſtatute of 23 *H.* 8. *cap.* 1. the juſtices of the county of *B.* ſhall ouſt him of his clergy in the county of *B.* whether he be convicted, ſtand mute, challenges above twenty, or anſwers not directly.

And tho this clauſe be repealed by the ſtatute of 1 *E.* 6. *cap.* 12. it is again revived by 5 & 6 *E.* 6. *cap.* 10. and [349] ſtands now in force as to all robberies, where the party, if convict, is to be ouſted of his clergy by the ſtatute of 23 *H.* 8. *cap.* 1.

But it extends not to any felony, where clergy is ouſted by any ſtatute after 23 *H* 8. *Co. P. C. cap.* 50. *p* 115. *Stamf. P. C. fol.* 128. *a.* (*).

If *A.* commits a robbery near the highway in the county of *B.* and takes away but to the value of 6*d.* yet if indicted for robbery in the county of *B.* he ſhall have judgment of death without benefit of clergy, but if he carry thoſe goods into the county of *C.* and there is indicted and pleads, and the jury find him guilty to the value of 6*d.* tho upon the evidence it appears that it was a robbery in the county of *B.* yet he ſhall not have judgment of death, becauſe as it now ſtands, it is but petit larceny *(a)*, where the priſoner is not to have his clergy but to be whipt, and the examination given by the ſtatute of 25 *H.* 8. is only to ouſt clergy, where demandable. *M.* 31 *Eliz. Moore's Rep. n.* 739. *p.* 550.

If a man be indicted for a robbery *in viâ regiâ* (†), or *in altâ viâ*, or *in altâ viâ regiâ*, and be convict, he ſhall be ouſted of his clergy by the ſtatute of 23 *H.* 8. but if it be laid to be in *in viâ regiâ pedeſtri ducent' de London ad Iſlington*, tho he be convict, he ſhall have his clergy; adjudged 38 *H.* 8. *Moore's Rep. n.* 16. *p.* 5.

But in that caſe it might have been laid *propè altam viam regiam*, and he ſhould have been ouſt of his clergy, for the words of the ſtatute are *in* or *near* the highway.

If a man be robbed upon the river *Thames*, or other public river within the body of a county, this is a robbery upon the king's highway, and may be ſo laid in the indictment, and the party ſhall be ouſted of his clergy upon theſe ſtatutes, and ſo it was agreed in *Hide's*

(*) *Vide Part* I. *p.* 518. But by 3 & 4 *W. & M. cap.* 9. the like clauſe is enacted as to all felonies, wherein clergy was ouſted by that or any other ſtatute.

(a) Vide Part I. *p.* 536.

(†) According to what our author ſays *Part* I. *p.* 535. if the indictment be laid only *in viâ regiâ*, this will not be ſufficient to ouſt clergy.

caſe at *Newgate*, *M.* 23 *Car.* 2. for the public ſtreams are highways, and therefore they are called *hault ſtreames le ray* (*).

But this ſtatute of 25 *H.* 8. extends not to ſtanding mute, or not directly anſwering in an *appeal*, but only in an *indictment*, and therefore,

3. The ſtatute of 1 *E.* 6. *cap.* 12. ouſts ſuch robbery of clergy as well in an appeal as indictment, where the offender ſtands mute, or will not directly anſwer.

But mentions nothing of challenging peremptorily above twenty, neither need it, for, as hath been ſaid (†), he ſhall be only put from his challenge, and the jury ſhall be charged to paſs upon him, and no conviction or *peine fort & dure* ſhall enſue upon his peremptorily challenging above twenty, as the law now ſtands.

But whereas *Stamf. Lib.* II. *cap.* 42. *fol.* 129. *b.* affirms, "That "upon all theſe ſtatutes, and in all the caſes mentioned in them there "are two caſes, wherein the offender in murder, robbery, *&c.* ſhall "have his clergy, namely, where the offender is outlawed, or convict "by battle," it is not true of the former, for outlawry is an attainder, and tho 23 *H.* 8. & 25 *H.* 8. ſpeak neither of outlawry nor attainder, yet the ſtatute of 1 *E.* 6. *cap.* 12. ſaith, if any perſon be *attaint* or convict of murder, *&c.* he ſhall be ouſted of clergy.

And the ſame law it is, if the appellee of robbery be vanquiſhed in an appeal, for he is thereby *convict*, and the ſtatute doth not mention only a conviction by twelve men, but *any perſon in due form of law attaint or* convicted *of murder*, &c.

And thus far concerning principals.

As touching acceſſaries by malitious commanding, hiring or counſelling any ſuch robbery, they are ouſted of clergy by 4 & 5 *P.* & *M.* *cap.* 4. in all caſes, namely being convict, ſtanding mute, not directly anſwering, or outlawed, *&c.*

But acceſſaries *after* having the benefit of clergy in all caſes.

Secondly, As touching a robbery from the houſe of any perſon.

This divides itſelf into theſe ſeveral heads.

[351] 1. Robbing in the dwelling houſe, the owner, his wife or family in the houſe and put in fear.

2. Robbing in the dwelling houſe, *any perſon* being in the houſe and put in fear.

(*) *Vide Par.* I. *f.* 536.

(†) *Supra*, *p.* 270.

3. Robbing

3. Robbing in the houſe or tent, the owner, his wife, or ſervants being in the houſe, tho not being put in fear.

4. Robbing a houſe, and no perſon being therein.

As to theſe in their order.

I. Robbing any perſon in his dwelling houſe or dwelling place, the owner or dweller, his wife, children, or ſervants being within the ſame and put in fear or dread by the ſame.

By the ſtatute of 23 *H.* 8. *cap.* 1. as well in an appeal as an indictment, the principal and acceſſary before the fact are ouſted of clergy in two caſes, namely,

1. If convict by verdict. 2. If convict by confeſſion.

By the ſtatute of 25 *H.* 8. *cap.* 3. there is farther proviſion made, but only in caſe of indictment, not of appeal, and only againſt the principal, but not the acceſſary *before* or *after*, *viz.* 1. If the principal ſtand mute of malice or froward mind. 2. If he challenge above twenty peremptorily. 3. If he will not directly anſwer.

There is farther proviſion made for ouſting of clergy, where robbers of houſes carry the goods into another county and be there indicted of larciny, if upon examination they ſhould be ouſted of clergy, had they been indicted in the firſt county; but, as hath been before obſerved,

1. This ouſting of clergy by examination in a foreign county refers only to ſuch robbery, as by the ſtatute of 23 *H.* 8. *cap.* 1. is ouſted of clergy, namely, where the owner, his wife, children, or ſervants are then in the houſe and put in fear, not to ſuch robberies, as by acts of parliament made ſince are put out of clergy. 2. In caſe of an arraignment in a foreign county, if the goods prove to be but of the value of 12*d.* here is no clergy to be demanded or allowd, being but petit larciny, and therefore no ouſting of clergy by examination.

Dorothy Cole (*) was indicted in *Suſſex* for ſtealing goods, upon the evidence it appeard, that ſhe broke a houſe in *Kent*, [352] and brought the goods into *Suſſex*, the jury found the goods to be of the value but of 7*s.* yet in as much as there was no putting in fear of the owner, his wife, or family, ſhe was to have the benefit of the ſtatute of 21 *Jac.* and could not be ouſted of it by examination, for tho by the ſtatute of 39 *Eliz.* *cap.* 15. clergy was taken away, yet the taking away of clergy upon examination in a foreign county extends only

(*) *Vide Part* I. *p.* 518.

to robberies where clergy is taken away by 23 *H.* 8. but if it had been with a putting in fear, ſo that in caſe of a man he ſhould have been ouſted of his clergy, it deſerves conſideration, whether the woman, if under 10*s.* ſhould have been ouſted of the benefit of the ſtatute of 21 *Jac. cap.* 6. by examination, tho originally it were a burglary and robbery. *Sed de hoc infra.*

But theſe ſtatutes did not extend to any ſuch robbery, where 1. There was no putting in fear. 2. Where the owner, his wife, children or ſervants were not in the houſe, but only a ſtranger were there and put in fear. 3. Neither did they extend to one attaint by outlawry or battle. 4. The ſtatute of 25 *H.* 8. extended not to appeals.

As to the acceſſaries before the fact, by the ſtatute of 4 & 5 *P.* & *M. cap.* 4. it is enacted, "That if any ſhall command, hire, or "counſel any perſon to do any robbery in any dwelling houſe or "houſes, they ſhall be excluded from clergy in all caſes, *viz.* convict, "outlawd, ſtanding mute, *&c.*

Upon this ſtatute theſe things are obſervable.

1. It requires an actual robbing, *viz.* taking away ſome goods; a bare breaking of the houſe is not ſufficient.

2. It extends to a robbing, without mentioning *put in fear.*

3. It extends to outlawry, which 23 or 25 *H.* 8. extended not to.

4. It extends to appeals as well as indictments; but acceſſary *after* are in no caſe excluded from clergy.

[353] II. Robbing of any perſon by day or night, any perſon being then in the ſame houſe, and put in fear or dread thereby.

By the ſtatute of 1 *E.* 6. *cap.* 12. clergy is taken away in all caſes, *viz.* if he be attaint by outlawry or otherwiſe, convict by verdict, confeſſion, or wager of battle, ſtands mute, or will not directly anſwer: And this as well in appeals as indictments.

It is true, it mentions not peremptory challenge of above twenty, neither is it material for the reaſon before given.

But this ſtatute, tho it ſpeaks generally of breaking a houſe by day or by night, hath had this conſtruction always allowd, *viz.*

If the breaking of the houſe be in the night, then it muſt be ſuch a breaking as amounts to burglary, *viz.* with an intention to commit a felony, and then it ouſts clergy, if it be with a putting in fear.

If

If it be a breaking the houſe in the day-time, then it muſt be alſo a breaking, as hath an actual robbery joined with it, and then if there be a putting in fear alſo, the clergy is ouſted in all the caſes mentiond in this ſtatute.

But in both caſes there muſt be a putting in fear, otherwiſe this ſtatute ouſts not clergy.

This ſtatute therefore hath made theſe additions to the ſtatutes of 23 & 25 *H.* 8. *viz.* 1. It exempts burglary from clergy, tho there be no robbery, if there be a putting in fear. 2. If there be a burglary in the night, or robbery in the day committed in the houſe, and any ſtranger be then in the houſe and put in fear, it excludes from clergy, tho it be not the owner or any of his family. 3. It excludes the principal from clergy in all caſes, where he is not excluded by any of the two former ſtatutes *(b)*.

But again on the other ſide, it reſtores clergy to the acceſſary before the fact, tho convict by verdict or confeſſion, and repeals ſo much of the ſtatute of 23 *H.* 8. as excludes the acceſſary *before* from clergy. But as hath been ſaid, the ſtatute of 4 & 5 *P.* & *M. cap.* 4. takes off the clergy again from acceſſaries where there is a [354] robbery and a putting in fear, but not where there is only a burglary with a putting in fear, but without robbery; but acceſſaries *after* in all caſes have their clergy.

III. If any perſon be found guilty of robbing any perſon in any part of his dwelling houſe or dwelling place, the owner or dweller of the ſame houſe, his wife, children, or ſervants then being within the ſame, or in any other place within the precinct of the ſame houſe or place, ſuch offender ſhall not be admitted to his clergy, whether ſuch dweller or owner, his wife or children then and there being ſhall be ſleeping or waking. 5 & 6 *E.* 6. *cap.* 9.

And the ſame proviſion is made for excluding clergy, where a perſon ſhall commit a robbery in a booth or tent in any fair or market, the owner, his wife, children or ſervant being then in the ſame booth ſleeping or waking.

Upon this act we are to obſerve,

1. There muſt be an actual breaking of the houſe, ſuch a breaking as would make a burglary if committed in the night, and the indictment muſt run *fregit & intravit dominum manſionalem* J. S.

(b) Viz. in caſe of attainder by outlawry, and alſo in caſe of ſtanding mute, or not directly anſwering in an appeal.

præ-

præfato J. S. *uxore & liberis ſuis in eâdem domo exiſtent'*, and ſuch a breaking of the houſe muſt be provided in evidence: *vide ſupra, Lib.* I. *cap.* 44. *p.* 522.

2. The alleging of ſuch a breaking of the houſe is ſufficient to bring him within the ſtatute to ouſt him of his clergy, if it be proved, tho it be not alleged by the way of robbery, *viz. violenter & à perſonâ*, but only *è domo prædictâ*, for it countervails a robbery within this ſtatute.

If the ſervant ſteal goods out of his maſter's houſe in the day or night, the maſter, his wife and children being in the houſe, the ſervant is not to be ouſted of clergy by this ſtatute, for here is no breaking of the houſe.

If the ſervant unlatch a door, or turn a key in a door in the houſe and ſteal goods out of that room, tho if he had been a ſtranger, that had not to do in the houſe, he ſhould hereupon be ouſted of his clergy, yet it ſeems to me the ſervant ſhall not be thereupon ouſted of his clergy, for the opening the door in this manner is [355] within his truſt and ſo no breaking of the houſe, nor robbery within this act, and the ſame law ſeems to be upon the ſtatute of 39 *Eliz. cap.* 15.

But if the ſervant break open a door, whether outward or inward, (as for the purpoſe a cloſet ſtudy, or counting-houſe,) and ſteal goods, this is a robbery and breaking the houſe within this ſtatute, as alſo within the ſtatute of 39 *Eliz.* for ſuch a breaking, tho by a ſervant in the night, would make burglary, for ſuch an opening is not within his truſt.

3. But there muſt not only be a breaking of the houſe, the owner, his wife, children or ſervants being within the ſame, but there muſt be alſo a felonious taking of the goods out of the houſe to exclude clergy by this ſtatute.

4. But a bare felonious taking of goods out of the houſe, whether by night or day without ſuch a breaking, as would make burglary, if done in the night, excludes not from clergy within this ſtatute.

5. This ſtatute both as to robbery in dwelling houſes or booths requires, that the dweller or owner, his wife, children, ſervants or ſervant be then within the houſe; ſo that the being of a ſtranger in the houſe excludes not clergy no more than upon the ſtatutes of 23 *H.* 8. *cap.* 1. *Stamf. P. C. fol.* 129. *b.*

6. It

6. It extends to no other caſe, but where the party is found guilty, *viz.* either by verdict or confeſſion, and not to outlawry, ſtanding mute, or not directly anſwering, therefore in all theſe caſes the offender ſhall haye his clergy. *(c)*.

7. It extends to an appeal, as well as indictment.

8. It doth not exclude acceſſaries neither *after* nor *before* from clergy.

Neither doth the ſtatute of 4 & 5 *P. & M. cap.* 4. extend to acceſſaries in this caſe, but only where robbery is committed, and any perſon within the houſe put in fear.

So that upon this ſtatute all acceſſaries to the felony deſcribed by this ſtatute are to have their clergy.

IV. Robbing from the houſe goods to the value of 5*s.* in the day-time, no perſon being in the houſe. [356]

By the ſtatute of 39 *Eliz. cap.* 15. it is enacted, "That if any "perſon be found guilty by verdict, confeſſion, or otherwiſe for the "felonious taking away in the day-time of any money, goods or "chattels of the value of 5*s.* or upwards in any dwelling houſe or "houſes, or any part thereof, or in any outhouſe belonging or uſed "with the ſaid dwelling houſe, altho no perſons ſhall be in the ſaid "houſe or outhouſe at the time of the felony committed, ſuch per-"ſons ſhall be excluded from their clergy.

1. Altho this ſtatute ſpeak only of *felonious taking* in the body or purview, yet inaſmuch as in the preamble it ſpeaks of *robbery* of houſes, a bare taking of goods out of a houſe, no body therein, without an actual breaking of the houſe, ſuch as would make burglary were it in the night, is not ſuch a taking out of a houſe, as excludes from clergy, and thus it hath conſtantly obtained in practice againſt the opinion in *Popham's Reports* 84. *Bayne's* caſe *(d)*.

2. The indictment muſt run according to the ſtatute, *viz. quòd tempore diurno, ſcilicet inter horas &c. domum manſionalem* J. S. *fregit & intravit nullâ perſonâ in eâdem domo tunc exiſtente, & ibidem &c. in eâdem domo inventa adtunc & ibidem felonicè furatus fuit, cepit & aſportavit*, for breaking the houſe in the day without taking goods is no felony. 11 *Co. Rep.* 36. *a. b. Poulter's* caſe.

(c) But by 3 & 4 *W. & M. cap.* 9. clergy is taken away in theſe caſes alſo.

(d) This caſe therefore was not eſteemed to be law, *Kel.* 68. but now by 10 & 11 *W.* 3. *cap.* 23. clergy is taken away from all who ſhall by night or day privately and feloniouſly ſteal to the value of 5*s.* in any ſhop, ware-houſe, coach-houſe or ſtable, or by 12 *Ann. cap.* 7. to the value of 40*s.* in any dwelling houſe or outhouſe thereto belonging, altho it be not broken, nor any perſon therein.

And

And if upon the evidence it fall out, that it was in the night, or that any perſon was in the houſe at the time, or that he ſtole, but broke not the houſe, he ſhall be found guilty of a ſimple felony and have his clergy, but not guilty according to the ſtatute *(e)*.

[357] But there need not either in this caſe, or upon the ſtatute of 5 & 6 *E.* 6. above-mentiond be a formal mention of a robbery, as is uſed in an indictment for robbery from the perſon, for *fregit domum* imports it.

3. It takes away clergy only from the principal, and that only where the perſon is convict by verdict, confeſſion, or otherwiſe, and therefore excludes not clergy, where the party ſtands mute, or is outlawd *(f)*, or will not directly anſwer, nor from the acceſſary. 11 *Co. Rep.* 36. *b. Poulter's* caſe.

4. If a man break the houſe in the day-time with intent to ſteal, but ſteals nothing, this is no felony, but otherwiſe in caſe of breaking the houſe in the night with intent to ſteal, this is burglary 11 *Co. Rep.* 31. *b. Poulter's* caſe.

If a man enter by the doors or windows open and ſteal goods, this excludes not clergy upon this ſtatute, nor upon the ſtatute of 5 & 6 *E.* 6. *cap.* 9. for it muſt be ſuch an act to make a robbery within either of theſe ſtatutes, as would make a burglary, were it in the night; it muſt be *fregit & intravit.*

And therefore the conſtant uſe at *Newgate* is, and always hath been upon theſe ſtatutes, that if a man enter the doors being open, and breaks open a cheſt and ſteals goods to the value of 5*s.* this ſhall not ouſt him of his clergy within this ſtatute, or the ſtatute of 5 & 6 *E.* 6. *c.* 9. *(g)*.

But if a man enters an houſe the outward doors being open, and when he is in the houſe, breaks open, or unlocks or unlatcheth an inward door and ſteals goods out of the room to the value of 5*s.* he ſhall be ouſted of his clergy upon this ſtatute, the ſame being done in the day-time no body being in the houſe; or if he ſteals goods of any value out of that inward room ſo opened by day or by night, the owner of the houſe, his wife, children, or ſervants being in the houſe,

(e) But theſe caſes are now provided againſt by 10 & 11 *W.* 3 & 12 *Ann* above-mentiond. *Vide Part* I. *p.* 564. *in notis.*

(f) Theſe caſes are ſince taken in by 3 & 4 *W. & M. cap.* 9. by which ſtatute clergy is alſo taken away from all who comfort, aid, abet, aſſiſt, counſel, hire, or command.

(g) Vide Part I. *p.* 523, 524, 527, & *Kel.* 69.

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he ſhall be ouſted of his clergy, being indicted upon the ſtatute of 5 & 6 *E.* 6. *cap.* 9.

T. 16 *Car.* 2. *Simpſon*'s caſe *(h)* at *Cambridge* aſſiſes. *A.* being indicted upon the ſtatute of 39 *Eliz.* it was found by [358] ſpecial verdict, that *A.* breaking into the houſe by day, no body being in the houſe, and breaking open a chamber-door and a cheſt, took out goods to the value of 5 *s.* and laid them on the floor, and before he could carry them out of the houſe was taken: By the advice of all the judges of *England* he was ouſted of his clergy upon this ſtatute, for the taking them out of the cheſt was felony, and the ſtatute doth not alter the felony, but excludes from clergy, if it were done in the houſe, and of the value of 5 *s.* and none in the houſe.

Trin. 13 *Car.* 1. *Evans* & *Finch (i)* were indicted, for that they *tempore diurno, viz. circa horam* 12. did break *domum manſionalem* Hugonis Audley in the *Inner-Temple* London, *nullâ perſonâ in eâdem domo exiſtente*, and ſtole thence 40 *s.* Upon a ſpecial verdict found in this caſe, theſe points were reſolved.

1. That a chamber in an inn of court is *domus manſionalis* within this ſtatute.

2. That if no body were in the chamber at the time, tho others were in other chambers of the temple, yet this was a breaking of the *domus manſionalis* Hugonis Audley *nullâ perſonâ in eâdem domo exiſtente*, and maintains the indictment.

3. Becauſe only one of the perſons indicted did actually enter the chamber and took out the money, *viz. Evans*, and the other ſtood without upon the ladder and received it, *Evans* was excluded his clergy, and the other who ſtood upon the ladder and received the money had his clergy.

And poſſibly the ſame law may be upon the ſtatute of 5 & 6 *E.* 6. *cap.* 9. that he only, that enters the houſe in the day- [359] time without putting in fear, and actually takes the goods ſhall be excluded from clergy, and thoſe, that ſtand without the houſe and

(h) According to this ſtate of the caſe here was a breaking not only of *a cheſt*, but alſo of *a chamber-door*, which is on all hands agreed to be an act ſufficient to make a robbery within the ſtatute, and ſo the difficulty removed, which ariſes from this caſe, as ſtated above *Part* I. *p.* 524 & 527, and indeed as that caſe is reported in *Kelyng p.* 31. and *in hoc libro Part* I. *p.* 508. & *p.* 526. the queſtion about the cheſt or trunk ſeems to have been only with relation to the *taking away*, whether the taking goods out of a cheſt and laying them on the floor without carrying them out of the chamber was a *taking away* or *ſtealing* within the ſtatute, and not whether it was a *robbery*, for if it were a ſtealing, that would be clear by the breaking open the chamber-door.

(i) *Cro. Car.* 473. *vide Part* I. *p.* 527. 556.

are

are preſent and abetting, tho all principals, yet ſhall have their clergy, for I can ſee no difference in the caſes; *quære tamen (k).*

But if it were a burglary, then as well thoſe without, that were preſent and aſſiſting, as thoſe within, ſhall be excluded from clergy by the general words of the ſtatute of 18 *Eliz. cap.* 7. *they that commit any manner of burglary*; and the like in rape and in murder.

And ſo I do take it without any difficulty, if *A. B.* & *C.* come to commit a robbery upon the perſon of a man, and *A.* only takes the money from the perſon, and *B.* and *C.* are preſent and aſſiſting, or if they break a houſe in the day-time and commit a robbery in the houſe putting in fear, tho *A.* only enters the houſe, and *B.* and *C.* watch without, they ſhall be all excluded from clergy, for they are all robbers.

And if it ſhould be otherwiſe, this great abſurdity would follow, that *B.* and *C.* that are preſent, aiding and aſſiſting in the robbery, ſhould have a greater privilege, where they are preſent and ſo principals in the felony, than they ſhould have had, if they had been abſent, and only acceſſaries before the fact, in which caſe the ſtatute of 4 & 5 *P.* & *M. cap.* 4. excludes them from clergy in all caſes.

See the references at the end of ch. XLIV. ante.

(k) This doubt is now at an end, for by 3 & 4 of *W.* & *M. cap.* 9. clergy is excluded from all aiders, abettors, &c.

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[360]

CHAP. XLIX.

Concerning clergy *in* burglary.

BURGLARIES may be of two kinds. 1. Simple burglary, that hath no robbery joined with it. 2. Burglary, that hath robbery or theft joined with it.

I. The former of theſe is, when a man in the night-time breaks and enters a houſe to the intent to commit a robbery, theft, or other felony.

And this, as it had the benefit of clergy by the common law and by the ſtatute of 25 *E.* 3. *cap.* 4. *pro clero*, ſo it was not ouſted of clergy neither

neither by the ſtatute of 23 *H.* 8. nor the ſtatute of 25 *H.* 8. but the firſt ſtatute that ouſted clergy in burglary was 1 *E.* 6. *cap.* 12.

This ſimple burglary is again of two kinds. 1. Where any perſon is in the houſe and put in fear or dread. 2. Where no perſon is put in fear or dread, as poſſibly where no perſon is in the houſe, which yet taketh not away the offenſe of burglary. *Popham's Rep.* 42. *per omnes juſticiarios Angliæ*, or if any perſon being in the houſe, yet is ſleeping and perceives not the burglary till the next morning, *&c.*

1. In the *firſt* of theſe caſes of ſimple burglary, namely with putting in fear or dread, the ſtatute of 1 *E.* 6. *cap.* 12. takes away clergy from the principal in all caſes, *viz.* tho attaint by outlawry or otherwiſe, or convict, or ſtanding mute, or not directly anſwering, as appears by the ſtatute itſelf, and the interpretation made of it. *Stamf. P. C. fol.* 126. *a.* 11 *Co. Rep. Poulter's* caſe.

But clergy is not taken away from acceſſaries *before* or *after* by this or any other ſtatute, for as to the ſtatute of 4 *&* 5 *P. & M.* tho it take away clergy from thoſe, that malitiouſly command, or hire, or counſel any perſon to do any robbery in any dwelling houſe, yet unleſs there be a robbery in the dwelling houſe, as well as a burglary, it takes not away clergy from the acceſſary *before* [361] *(a)*, nor at all from the acceſſary *after*.

2. As to the *ſecond* kind of ſimple burglary without putting in fear, the ſtatute of 18 *Eliz. cap.* 7. generally takes away clergy from all perſons that ſhall commit any manner of burglary in three caſes. 1. If he be outlawed for it. 2. If he ſhall be found guilty of it by verdict, or 3. If upon his arraignment he ſhall confeſs it.

But in all other caſes of ſtanding mute, or not directly anſwering he is to have his clergy (*).

And therefore, if a man be generally indicted of burglary without purſuing the ſtatute of 1 *E.* 6. *cap.* 12. *viz.* without alleging in the indictment, that the owner, his wife, children or ſervant were in the houſe and put in fear, the priſoner ſtanding mute, or not directly anſwering ſhall have his clergy, (namely, where the indictment is general,) notwithſtanding the ſtatute of 18 *Eliz. cap.* 7.

But the acceſſaries as well *before* as *after* are within privilege of clergy, for neither this nor any other ſtatute hath excluded them *(a)*.

(*) By the ſaid ſtatute of 3 *&* 4 of *W. & M.* clergy is taken away alſo in caſes of ſtanding mute, or not directly anſwering.

(*a*) But by 3 *&* 4 of *W. & M. cap.* 9. clergy is taken away from the acceſſary before the fact.

II. But

II. But now as to burglary joined with larceny or robbery in the dwelling houſe, this again is of two kinds, either with putting in fear, or without putting in fear.

If with putting in fear, then by the ſtatute of 23 *H.* 8. *cap.* 1. & 25 *H.* 8. *cap.* 3. the owner or dweller, his wife, children, or ſervants being within the houſe and put in fear, the offender is ouſted of his clergy, not upon the account of the burglary ſimply conſidered, but upon the account of the robbery, if the party be found guilty by verdict or confeſſion, or ſtand mute, or will not directly anſwer.

But by the ſtatute of 1 *E.* 6. *cap.* 12. he is excluded from clergy in all caſes, if any perſon were in the houſe and put in fear.

[362] And altho as to the acceſſaries *before*, the ſtatute of *E.* 6. *cap.* 12. reſtores clergy unto them, yet by the ſtatute of 4 & 5 *P.* & *M. cap.* 4. clergy is in this caſe taken away from acceſſaries before the fact, *viz.* counſellors, or commanders to do any robbery in a manſion-houſe are ouſted of clergy in all caſes.

But if it were a burglary joined with robbery of goods out of the houſe, whether the party were put in fear or not, the principal is ouſted of clergy by the ſtatute of 18 *Eliz. cap.* 7. upon the ſingle account of the offenſe of burglary, (if the offender be outlawed or convict by verdict or confeſſion,) for that ſtatute as to the point of clergy is not at all concerned as to the robbery, but ſingly upon the account of burglary the clergy is ouſted, tho he be acquit of the robbery or larceny.

But then as to the acceſſaries before the fact it is conſiderable, whether in burglary joined with robbery without putting in fear the acceſſary ſhall be ouſted of clergy by the ſtatute of 4 & 5 *P.* & *M. cap.* 4. it ſeems to me to be with this difference.

If the principal be indicted upon the ſtatute of 5 & 6 *E.* 6. *cap.* 9. ſpecially, ſetting forth, that the offender *felonicè & burglariter fregit domum* J. S. *prædicto* J. S. *uxore, liberis & ſervientibus ſuis in eâdem domo exiſtentibus*, and ſtole the goods in the ſame houſe, then the acceſſary to ſuch an indictment ſhall be arraigned and tried, and if convicted ſhall be ouſted of his clergy by force of the ſtatute of 4 & 5 *P.* & *M. cap.* 4.

But if in that caſe the principal be convict of the burglary, but acquit of the robbery, the acceſſary ſhall have his clergy, for the ſtatute of 4 & 5 *P.* & *M.* doth not exclude the acceſſary from clergy, but where there was a robbery.

And

And again, if the principal be indicted generally of burglary and robbery without forming the indictment either upon 23 *H.* 8. of putting in fear, or upon the ſtatute of 5 & 6 *E.* 6. the owner, his wife or children being in the houſe, tho the principal be convicted and ouſted of his clergy by the ſtatute of 18 *Eliz.* yet the [363] acceſſary ſhall have his clergy, altho here were a robbery committed in the dwelling houſe, and ſo within the ſtatute of 4 & 5 *P.* & *M.* *cap.* 4. and the reaſons are apparent.

1. Becauſe the principal is not ouſted of his clergy in reſpect of the robbery, for that not being laid according to either of the ſtatutes of 23 *H.* 8. or 5 & 6 *E.* 6. if there were no burglary in the caſe, he ſhould have had his clergy, and he is ouſted of his clergy merely upon the account of the burglary by the ſtatute of 18 *Eliz.* *cap.* 7. and not of the robbery, becauſe not laid purſuant to either of theſe ſtatutes of 23 *H.* 8. & 5 & 6 *E.* 6. and the ſtatute of 4 & 5 *P.* & *M.* ouſts the acceſſary of clergy in relation to the robbery in the dwelling houſe, and not in relation to the burglary.

2. Becauſe the ſtatute of 4 & 5 *P.* & *M.* cannot at all have any reſpect to the ſtatute of 18 *Eliz.* which was made twenty years after, and at the time of the ſtatute of the queen neither ſimple burglary, nor burglary joined with robbery had ouſted the principal of clergy, unleſs the robbery were purſuant to the ſtatutes of 23 *H.* 8. or 5 & 6 *E.* 6. which is not laid in the indictment purſuant to either, and therefore the acceſſary could not be ouſted of clergy by 4 & 5 *P.* & *M.* in this caſe, when if the principal himſelf had been indicted of burglary and robbery generally, he ſhould have had his clergy both as to the burglary and as to the robbery; ſo that upon a general indictment of the principal of burglary and robbery in the houſe, the acceſſary can in no ſort be excluded of clergy, unleſs the principal be ſpecially indicted of the robbery purſuant to the ſtatute of 23 *H.* 8. the owner, his wife or children being in the houſe and put in fear, or according to the ſtatute of 5 & 6 *E.* 6. *cap.* 9. the owner, his wife or ſervants being in the houſe, for tho the principal upon a general indictment of burglary and robbery may be ouſted of his clergy by the ſtatute of 18 *Eliz.* if found guilty of the burglary, yet he cannot be ouſted of his clergy upon the account of the robbery, becauſe not particularly laid according to the old ſtatutes, and conſequently the acceſſary muſt [364] in that caſe have his clergy *(b)*.

(b) But as to this point the law is now altered, for by 3 & 4 *W.* & *M.* *cap.* 9. clergy is taken away from the acceſſary *before* in all caſes of burglary.

But in all caſes acceſſaries *after*, muſt have their clergy.

See the references at the end of ch. XLIV. ante.

CHAP. L.

Concerning clergy *in* ſimple larceny *and other felonies.*

I Come now to conſider of ſome other kinds of felonies, wherein clergy is taken away, and eſpecially in larcenies of ſeveral kinds.

1. Stealing of horſes. 2. Sacrilege. 3. Taking from the perſon *clàm & fecretè*. 4. Servants robbing their maſters. 5. Taking clothes off from racks. 6. Stealing king's ſtores. 7. Taking away women againſt their wills. 8. I ſhall conſider of piracies and robberies upon the ſea. 9. Concerning clergy of priſoners arraigned before the ſteward and marſhal.

I. By the ſtatute of 1 *E.* 6. *cap.* 12. the felonious ſtealing of horſes, mares or geldings is put from the privilege of clergy.

1. If the perſon be attainted. 2. Or convict by verdict or confeſſion. 3. Or ſtands mute. 4. Or will not directly anſwer. This was in effect enacted before by 37 *H.* 8. *cap.* 8. but it was neceſſary to be re-enacted here, becauſe otherwiſe the general clauſe in the act of 1 *E.* 7. *cap.* 12. reſtoring clergy in all caſes where they had it before 1 *H.* 8. had reſtored clergy in this caſe.

[365] There aroſe a doubt, whether, if there were one horſe, mare, or gelding ſtolen, the offender ſhould have had clergy; and the reaſon of the doubt was not ſingly, becauſe the ſtatute of 1 *E.* 6. was in the plural number, *horſes*, *mares*, or *geldings*, for then it might as well have been a doubt, whether upon the ſtatute of 23 *H.* 8. *cap.* 1. he, that had wilfully burned one houſe, ſhould not have had his clergy, becauſe the words of that ſtatute are in the plural number *dwelling houſes* or *barns*; and ſo for robbing any *churches* or *chapels*.

But the reaſon that made the ſcruple was, becauſe the ſtatute of 37 *H.* 8. *cap.* 8. was expreſly penned in the ſingular number, *If any man do ſteal any horſe, mare or filly:* and then this ſtatute of 1 *E.* 6. thus varying the number, and yet expreſly repealing all other excluſions of clergy introduced ſince the beginning of *H.* 8. made ſome doubt, whether

whether it were not intended to enlarge clergy, where only one horſe was ſtolen.

To remove this doubt was the ſtatute of 2 & 3 *E.* 6. *cap.* 33. whereby clergy is excluded from him that ſteals one horſe, gelding or mare in all the caſes of attainder, conviction, ſtanding mute, or not directly anſwering.

Theſe ſtatutes exclude the principal from clergy in all theſe caſes, but the acceſſary *before* or *after* have the privilege of clergy. 1 *Mar. Dy.* 99. *a.*

But by the ſtatute of 31 *Eliz. cap.* 12. *in fine ſtatuti* acceſſaries both *before* and *after* in horſe ſtealing are ouſted of clergy, as the principal ought to be.

II. As to ſacrilege, *viz.* the felonious taking of any goods out of any pariſh church, or other church or chapel, the principal is ouſted of clergy by the ſtatutes of 23 *H.* 8. *cap.* 1. 25 *H.* 8. *cap.* 3. and laſtly by 1 *E.* 6. *cap.* 12. in all caſes above-mentioned.

And by the ſtatute of 23 *H.* 8. *cap.* 1. the acceſſary *before*, if found guilty by verdict or confeſſion, was of clergy, but that is repealed by 1 *E.* 6. *cap.* 12. as to all acceſſaries.

And the ſtatute of 4 & 5 *P.* & *M. cap.* 4. extends not to this caſe, for it takes away clergy from robbery of any dwelling houſe, but doth not extend to robbing of churches or chapels *(c)*. [366]

And certainly clergy was not taken away in caſe of ſacrilege at common law, or if it were, yet the ſtatute of 25 *E.* 3. *pro clero cap.* 4. reſtored clergy in that caſe as well as others, and the ſtatutes of 23 *H.* 8. & 1 *E.* 6. had been needleſs in this caſe, if ſacrilege were ouſted of clergy at common law, and accordingly in the book of 26 *Aſſiz.* 19. *(d)* and conſequently it is miſtaken in *Poulter's* caſe 11 *Co. Rep.* 29. *b.*

III. As to picking of pockets, by the ſtatute of 8 *Eliz. cap.* 4. "If "any perſon be indicted or appealed for felonious taking any money, "goods, or chattels from the *perſon* of another *privily without his* "*knowledge* in any place whatſoever, and be found guilty by twelve "men, or confeſs upon his arraignment, or be outlawed, or ſtands "obſtinately mute, or will not directly anſwer, or challenge peremptorily above twenty, he ſhall be excluded from clergy.

(c) But if this ſhould be conſtrued a burglary, as it ſeems to be according to the book of 22 *Aſſiz.* 95. then clergy would be excluded from the acceſſaries *before*, by the 3 & 4 of *W.* & *M. cap.* 9.

(d) Vide accordant 26 *Aſſiz.* 27. *Coront* 193. *Vide contra* 30 *E.* 2. *Corone* 283. but according to *Stamf. P. C. fol.* 123. *b.* it was left to the diſcretion of the ordinary to claim him or not. *Vide Co. P. C. p.* 114.

Upon this ſtatute theſe things are obſervable.

1. It muſt be taken from the *perſon*.

2. It muſt be taken *privily without his knowledge*, and ſo laid in the indictment, otherwiſe he ſhall have his clergy.

3. The goods muſt be above the value of 12*d.* for tho in robbery of never ſo ſmall a value clergy is ouſted, becauſe done *violently*, yet here it is otherwiſe, for if it be not above the value of 12*d.* it is but petit larceny, for the ſtatute did not intend to alter the nature of the crime, but to exclude clergy, where it was grand larceny. *Co. P. C. cap.* 16. *p.* 68. *(e)*.

[367] 4. It doth not ouſt the acceſſary either *before* or *after* of the privilege of clergy.

IV. Concerning ſervants carrying away their maſters goods to the value of 40*s.* this was made felony by the ſtatute of 21 *H.* 8. *cap.* 7. *(f)*. And by the ſtatute of 27 *H.* 8. *cap.* 17. clergy was taken away.

By the ſtatute of 1 *E.* 6. *cap.* 12. reſtoring clergy in all caſes, as it was before 1 *H.* 8. except the caſes mentioned in that ſtatute, clergy is reſtored to that offenſe.

By the ſtatute of 1 *Mar. cap.* 1. repealing all felonies enacted ſince 1 *H.* 8. the very act itſelf of 21 *H.* 8. making this felony is repealed.

But by the ſtatute of 5 *Eliz. cap.* 10. the ſtatute of 21 *H.* 8. is again re-enacted to have continuance for ever; but the ſtatute of 27 *H.* 8. *cap.* 17. taking away clergy in that offenſe is not revived and ſo clergy ſtands allowable as to that offenſe at this day *(g)*.

V. By a ſtatute made the 22 *Car.* 2. *cap.* 5. clergy is taken away from thoſe that ſteal clothes off the racks, with power in the judge to tranſport them to the king's plantations *(h)*.

VI. By

(e) Vide Part I. *cap.* 44. *p.* 529.

(f) This ſtatute is to be taken ſtrictly with relation to ſuch goods, as are actually delivered to keep by the *maſter* or *miſtreſs Dy.* 5. *a. b.* for as to other goods, it was a felony at common law, tho under the value of 40*s.* but where there was a delivery, the ſervant being in lawful poſſeſſion, it could not at common law be a felony, *vide Part* I *p.* 667. Otherwiſe therefore it is in the caſe of a lodger ſtealing goods or furniture belonging to his lodgings, becauſe he is not intruſted with the poſſeſſion, but only with the uſe, and therefore it was felony at common law; *vide Part* I. *p.* 506. however to obviate all doubt, it is enacted and declared by 3 & 4 *W.* & *M. cap.* 9. "That if "any perſon or perſons ſhall take away with "an intent to ſteal, imbezzle, or purloin "any chattel, bedding or furniture, which "by contract or agreement he or they are "to uſe, or ſhall be let to him or them to "uſe in or with ſuch lodging, ſuch taking, "imbezzelling, or purloining ſhall be to "all intents and purpoſes taken, reputed "and adjudged to be larceny and felony, "and the offender ſhall ſuffer as in caſe of "felony.

(g) But ſince our author wrote is taken away again by 12 *Ann. cap.* 7. from all perſons, (except apprentices under the age of fifteen years, who ſhall rob their maſters,) if the offenſe be committed in a dwelling houſe or outhouſe.

(h) By 4 *Geo.* 2. *cap.* 16. the ſtealing linen, fuſtian, &c. from any whitening ground

VI. By the ſtatute of 22 *Car.* 2. *cap.* 5. clergy is taken away from thoſe that imbezzle or ſteal the king's ſtores *(i)*.

VII. By the ſtatute of 39 *Eliz. cap.* 9. clergy is taken away from offenſes committed againſt 3 *H.* 7. *cap.* 2. concerning taking away and marrying or defiling of women in all caſes, *viz.* upon attainder, conviction by verdict or confeſſion, ſtanding mute, challenging above twenty peremptorily, outlawry, not directly anſwering.

It extends to take away clergy in theſe caſes from all principals and acceſſaries before the fact in expreſs words, but not from acceſſaries after.

VIII. As to the ſtatute of 28 *H.* 8. *cap.* 15. concerning piracy, robbery, murders and manſlaughters upon the ſea, it is enacted, "That for treaſon, murder, robbery, felonies and confederacies done "upon the ſea or in any places whereto that commiſſion extended *(k)*, "the offenders ſhall not be admitted to have the benefit of clergy or "ſanctuary, but are excluded from the ſame *(l)*.

Upon

grounds to the value of 10s. or buying or receiving the ſame, knowing it to be ſtolen is excluded from clergy with power to the court upon the circumſtances of the caſe to tranſport the offender for ſeven years.

(i) Viz. in ſuch manner as is forbid by 31 *Eliz. cap.* 4. whereby it was made felony: *vide Part* I. *p.* 688.

(k) It was a doubt upon this ſtatute, whether an acceſſary at land to a felony or piracy at ſea was included within the extent of the commiſſion directed by this act, *Yelv.* 134, 135. but by 11 & 12 *W.* 3. *cap.* 7. (continued by 5 *Ann. cap.* 34. 1 *Geo.* 1. *cap* 25. and made perpetual by 6 *Geo.* 1. *cap.* 19.) it is provided, "That "acceſſaries to piracy before or after ſhall "be tried and adjudged according to 28 "*H.* 8. and ſhall ſuffer the ſame penalties "and in like manner as the principals.

If a mortal ſtroke be given on the high ſea, or on the ſhore at full ſea, and the party die upon the ſhore at low water, this is not within this ſtatute, nor ſhall the admiral have juriſdiction to try the offenſe, nor yet can it be tried at common law by a general commiſſion of *oyer* and *terminer*: *vide ſupra. p.* 20 & *Part* I. *p.* 426. To remedy this inconvenience it is provided by 2 *Geo.* 2. *cap.* 21. "That where any "perſon ſhall be feloniouſly ſtricken or "poiſoned upon the ſea or any place out "of *England*, and ſhall die thereof in "*England*; or ſhall be feloniouſly ſtricken "or poiſoned at any place in *England*, "and ſhall die thereof upon the ſea or any "place out of *England*, an indictment "may be found in ſuch county, where "ſuch death, ſtroke, or poiſoning ſhall "happen, againſt both principals and ac-"ceſſaries, and may be proceeded upon in "the ſame manner as if ſuch felonious "ſtroke and death, or poiſoning and "death had happened in the ſame coun-"ty, where ſuch indictment ſhall be "found.

(l) It was doubted, whether this ſtatute of 28 *H.* 8. had not taken away the trial of theſe offenſes before the admiral, or his lieutenant or commiſſary, which had occaſioned a total diſuſer of ſuch manner of trial to the encouragement of pirates, who could not be tried by this ſtatute, unleſs (at great trouble and expence) brought to *England*, and therefore the aforeſaid ſtatute of 11 & 12 *W.* 3. *cap.* 7. provides, thet they may be tried by the court of admiralty according to the directions of that act, which are there particularly mentioned.

By the ſame ſtatute it is enacted, "That "if any of the king's natural born ſub-"jects ſhall commit any piracy, robbery, "or act of hoſtility againſt others the "king's ſubjects, altho it be under colour "of a commiſſion from any foreign "prince; or being a commander or maſ-"ter of a ſhip, or ſeaman ſhall felonioufly "run away with his ſhip, &c. or volun-"tarily yield up the ſame to any pirate, "or

Upon conſideration of the ſtatute of 1 *E.* 6. *cap.* 12. which in all caſes not mentiond in that ſtatute reſtores the privilege of clergy, as it was before 1 *H.* 8, it is ſaid in *Poulter's* caſe 11 *Co. Rep.* 31. *b.* that thereby clergy is reſtored in caſe of piracy.

But upon conſideration of both theſe ſtatutes I think as followeth, *viz.*

1. *Firſt*, That by the ſtatute of 1 *E.* 6. *cap.* 12. in all other felonies (not particularly excepted by the ſtatute of 1 *E.* 6. *cap.* 12.) that the common law takes notice of, clergy is reſtored by the ſtatute of 1 *E.* 6. *cap.* 12. notwithſtanding this ſtatute of 28 *H.* 8. *cap.* 15. even for felonies within that juriſdiction or commiſſion of the admiralty ſettled by that ſtatute.

And therefore, if a man be ſlain below the bridges upon the river *Thames*, but not *ex malitiâ*, or if a larceiny be committed there, that is within clergy, if committed upon the land, the party ſhall be admitted to his clergy by force of the ſtatute of 1 *E.* 6. *cap.* 12.

2. *Secondly*, if ſuch a felony were committed upon the high ſea, that were not excepted by the ſtatute of 1 *E.* 6. *cap.* 12. but ſhould have had clergy by that ſtatute were it upon the land, in ſuch caſe, tho the proceeding be by the ſtatute of 28 *H.* 8. the party [370] ſhall have his clergy, for the ſtatute of 1 *E.* 6. is general, *in all other caſes of felony clergy ſhall be allowd as it was before* 1 *H.* 8. and the exemption of clergy (*) was before that ſtatute of 28 *H.* 8. extendible to the admiral's juriſdiction, as well as to courts of common law.

3. *Thirdly*, But as to piracy or robbery upon the ſea by pirates and rovers I think clergy remains ſtill taken away by the ſtatute of

" or bring any ſeducing meſſage from any " pirate, enemy, or rebel, or endeavour " to corrupt any commander, &c. to yield " up or run away with any ſhip, &c. or " turn pirate, or go over to pirates, or if " any perſon ſhall lay violent hands on his " commander to hinder him from fighting " in defenſe of his ſhip or goods, or ſhall " confine his maſter, or endeavour to make " a revolt in his ſhip, every ſuch perſon " ſhall be adjudged a pirate, felon and " robber.

By 8 *Geo.* 1. *cap.* 24. " All perſons, who " by 11 & 12 *W.* 3. *cap.* 7. are declared " acceſſaries to any piracy there mentiond, " are declared to be principal pirates.

By the ſame ſtatute it is provided, " That " if any one ſhall trade with or furniſh " any pirate, &c. with proviſions, &c. or " ſhall fit out any ſhip or veſſel with ſuch " deſign, or ſhall conſult or correſpond " with any pirate, &c. knowing him to " be ſuch, or ſhall forceably board and " enter any merchant ſhip on the high ſeas, " or in any port, haven or creek, and " ſhall throw over-board or deſtroy any " part of the goods or merchandizes be- " longing to ſuch ſhip, ſuch offender ſhall " be adjudged guilty of piracy, and ſhall " be tried according to the ſtatutes of 28 " *H.* 8. & 11 & 12 *W.* 3. and being con- " victed ſhall ſuffer as a pirate without " benefit of clergy.

(*) *Viz.* the allowance of clergy; for our author here means by *exemption of clergy* the privilege of being exempted on account of clergy from puniſhment in the king's temporal courts.

28 *H.* 8. and is not reſtored by 1 *E.* 6. *cap.* 12. *(m)*, and the reaſons are,

1. Becauſe I take it before 1 *H.* 8. there was no clergy allowable for it at common law, for it was an act of hoſtility, and conſequently is not touched by the ſtatute of 1 *E.* 6. *cap.* 12.

2. Admitting that clergy were allowable in piracy before 1 *H.* 8. and taken away merely by the ſtatute of 28 *H.* 8. *cap.* 15. yet clergy is not reſtored by 1 *E.* 6. therein, becauſe it reſtores it only *in all other caſes of felony*, which is intended only of felony, whereof the common law takes notice, but piracy is of another nature, and the common law takes not notice of it under the name of *felony*, and therefore a pardon of all *felonies* pardons not *piracy*: *vide Co. P. C. cap.* 49. *p.* 112, 113. and accordingly the uſe hath obtained in the proceedings of the commiſſions founded upon 28 *H.* 8.

IX. As to the ſtatute of 33 *H.* 8. *cap.* 12. touching felonies in the king's houſhold and proceedings thereupon before the lord ſteward there is a clauſe, that in caſe of manſlaughter in the king's houſe tried before the lord ſteward, and alſo in all other felonies committed within the king's houſe, the offenders, the abettors, procurers, and receivers being convict ſhall ſuffer pains of death, as appertaineth to felons, without benefit of clergy.

In my opinion the ſtatute of 1 *E.* 6. *cap.* 12. hath repeald ſo much of this ſtatute, as excludes from clergy ſuch offenſes [371] as are not exempt from clergy by 1 *E.* 6. for theſe are felonies, that the law takes notice of, and ſuch wherein clergy was allowable before 1 *H.* 8. and conſequently the general words of that act reſtore clergy in theſe caſes, tho the proceeding thereupon be before the lord ſteward by this act of 33 *H.* 8. *cap.* 12. for the words of 1 *E.* 6. *cap.* 12. are general *in all other felonies*, and they are *in materiâ favorabili*, in caſe of life, and in caſe of a privilege, which hath been ever favoured in law, and therefore ſhall be generally conſtrued and not reſtrained by conſtruction or interpretation.

See the references at the end of ch. XLIV. ante.

(m) As to thoſe who ſhall commit any offenſe, for which they ought to be adjudged pirates, felons, and robbers by 11 & 12 *W.* 3. *cap.* 7. clergy is expreſly taken away from ſuch by 4 *Geo.* I. *cap.* 11. and as no mention is made of ſuch as were deemed pirates before that ſtatute, it is an argument, that the law was taken to be, that they were ouſted of clergy before.

CHAP. LI.

What perſons *are or are not* capable of clergy.

I HAVE gone through the conſideration of the *crimes* or offenſes, wherein clergy is, or is not allowable; I now come to conſider the *perſons* that are, or are not capable thereof, admitting the crimes themſelves within clergy.

Touching perſons to be admitted to clergy, ſucceſſion of times hath made great change in the law. Antiently *Nuns* profeſſed were admitted to the privilege of clergy, tho they could not be prieſts, yet they are within the *privilegium* or *immunitas eccleſiæ*, and had their clergy, 22 *E.* 3. *Coron.* 461. but other women had not by the common law the privilege of clergy.

But at this day poſſeſſion is aboliſhed, and no woman admitted to the privilege of clergy at this day; only by the ſtatute of 21 *Jac.* [372] *cap.* 6. if a woman be lawfully convict by verdict or confeſſion of ſtealing goods under the value of 10*s.* and above the value of 12*d.* being ſuch an offenſe, wherein a man might have his clergy, ſhe ſhall for the firſt offenſe be burnt in the hand, and to be farther puniſhed with whipping, ſending to the houſe of correction, impriſonment, *&c.* as the judge ſhall in diſcretion think fit, this act hath continuance to this day by the ſtatutes of 3 *Car.* 1. *cap.* 4. 16 *Car.* 1. *cap.* 4. *(a)*.

Again by the ſtatute of bigamy *cap.* 5. *(b) Bigamus* was ouſted of clergy, 40 *Aſſiz.* 17. but by the ſtatute of 1 *E.* 6. *cap.* 12. he is reſtored to the benefit of clergy, if the offenſe be within clergy, and tho *Stamf. Lib.* II. *cap.* 46. *fol.* 134. *b.* doubts whether that point of the ſtatute be not repeald by the ſtatute of 1 *&* 2 *P. & M. cap.* 8. whereby all ſtatutes againſt the authority of the Pope or See of *Rome* are repeald, yet the law hath been ſufficiently ſettled in this point, that *bigamus* hath his clergy at this day *T.* 3 *Eliz. Dy.* 201. *b. Lamb's* caſe, for by the ſtatute of 1 *Eliz. cap.* 1. all the clauſes in the ſtatute

(a) But now upon the ſtatute of 3 & 4 of *W. & M. cap.* 9. a woman convicted or outlawd for any felony, for which a man might have his clergy, ſhall upon praying the benefit of that ſtatute be ſubject only to ſuch puniſhment, as a man would be in the like caſe, *viz.* be burnt in the hand and detained in priſon at the diſcretion of the judge, not exceeding one year.

(b) 2 *Co. Inſtit. p.* 273.

of

of 1 & 2 *P. M. cap.* 8. not ſpecially excepted are repeald, and this is none of the excepted clauſes, and ſo the ſtatute of 1 *E.* 6. *cap.* 12. ſtands renewed by 1 *Eliz. cap.* 1. if at all impeached or repeald by 1 & 2 *P. & M.*

Again, at common law, if the clerk convict deliverd to the ordinary had broke the biſhop's priſon and been after taken, he had loſt the benefit of his clergy, 22 *E.* 3. *Coron.* 257. but at this day that can never come in queſtion, for by the ſtatute of 18 *Eliz. cap.* 7. clerks convict are not now to be deliverd to the ordinary, but burnt in the hand and ſo diſcharged.

Again, antiently the law was held, that if the priſoner had not *habitum & tonſuram clericalem*, he ſhould not have the benefit of clergy, 26 *Aſſiz.* 19. 20 *E.* 2. *Coron.* 233. or the ordinary might have refuſed him, tho he could read; but in proceſs of time [373] that law was altered and the court would admit him to his clergy, if the caſe were within clergy, tho he had not *habitum & tonſuram*, if he could read, and tho the ordinary refuſed him upon that account. 9 *E.* 4. 28. *b.* 34 *H.* 6. 49. *a. b.*

A man attaint (*) of hereſy, a *Jew*, or a *Turk* ſhall not have their clergy, but a perſon excommunicate ſhall have his clergy. 11 *Co. Rep.* 29. *b. Poulter's* caſe.

A *Greek* or alien, who knows not our letters, ſhall have his clergy, and ſhall read in the book of his own country. *B. Clergy* 20.

A baſtard, a man blind ſhall have his clergy *(c)*, if he can ſpeak *Latin* congruouſly. *B. Clergy* 21, 22.

By the ſtatute of 4 *H.* 7. *cap.* 13. "A man not within holy orders, "that hath once had his clergy, ſhall be burnt in the hand with "with M or T, and being after arraigned for any ſuch offenſe, *(viz.* "an offenſe within clergy,) he ſhall not be admitted to his clergy a "ſecond time." "And if any man upon a ſecond arraignment for "ſuch offenſe claim his clergy, as being a clerk in orders, if he "have not his letters of orders, or certificate of the ordinary witneſſ- "ing the ſame, the juſtices ſhall by their diſcretion give him a day "to bring them, at which day if he fail, he ſhall loſe his clergy that "ſecond time.

(*) This ſhould be *convict*, and ſo it is expreſt in the authority here cited, *viz.* 11 *Co.* 29. *b.* for hereſy wrought no attainder, altho by 2 *H.* 5. *cap.* 7. fee-ſimple lands were forfeited upon conviction.

(*c*) This is denied of a blind man, 11 *Co. Rep.* 29 *b.* & *Broke* in the place cited above makes a *quære* of it, becauſe he can by no diſpenſation be a clerk in orders, *aliter* of a baſtard, for he may be a prieſt by licenſe.

Note

Note no man ſhall be ouſted of his clergy a ſecond time by the bare mark in his hand, or by a parol averment without the record teſtifying it (†), and it ſeems, that if he deny he is the ſame perſon, iſſue muſt be joined upon it and tried to be the ſame perſon, before he can be ouſted of clergy.

The orders, that come under the name of holy orders, were four, *viz. a biſhop, a prieſt, a deacon*, and *a ſubdeacon*; other infe-
[374] rior orders, as *exorciſtæ, lectiores, acoluthi, &c.* were not called holy orders, but were called *clerici in minoribus*.

By this and ſome other inſtances, which appear in the ſtatutes, it is evident, that the clergy in orders had a greater privilege allowd them than others.

1. A clergyman in orders in ſuch caſes, wherein clergy is ouſted by the ſtatute of 1 *E.* 6. *cap.* 12. as murder, robbery, *&c.* hath no more privilege than a layman, becauſe the ſtatute makes no exception or proviſion for him.

2. If a ſtatute be made after 1 *E.* 6. ouſting clergy generally, as the ſtatute of 4 *&* 5 *P. & M. cap.* 4. 18 *Eliz. cap.* 7. a clergyman in orders hath no more privilege than another, for the ſtatute provides not for him. *Stamf. P. C.* 135. *b.*

3. And therefore, tho the ſtatute of 23 *H.* 8. *cap.* 1. and 25 *H.* 8. *cap.* 3. excluding clergy from thoſe found guilty in petit treaſon, murder, robbery, *&c.* excepts ſuch as are in the order of ſubdeacon, or any ſuperior orders, and directs them to be delivered to the ordinary to remain in priſon without purgation, or to be degraded, and then ſent by the ordinary into the king's bench to be executed, it ſeems, that this privilege is at this day gone, 1. Becauſe by the ſtatute of 18 *Eliz. cap.* 7. all delivery of clerks convict to the ordinary is wholly taken away. 2. Becauſe in all thoſe caſes, where clergy is ouſted by the ſtatute of 23 *H.* 8. clergy is ouſted by the ſtatute of 1 *E.* 6. *cap.* 12. (except burning of houſes, and acceſſaries before the fact, which ſtand within clergy by the ſtatute of 1 *E.* 6. *cap.* 12.) and in that ſtatute there is no ſaving of any privilege for clerks in orders, as there is by 23 *H.* 8.

And then as to acceſſaries before the fact clergy is likewiſe generally taken away by the ſtatute of 4 *&* 5 *P. & M. cap.* 4. without ſaving of more privilege to clergymen than to laymen.

(†) Or a tranſcript thereof, for the manner of certifying which ſee 34 *&* 35 *H.* 8. *cap.* 14. and 3 *&* 4 *W. & M. cap.* 9.

4 But

4. But as to the privilege of a ſecond allowance of clergy, it ſhould ſeem at this day, clergymen in orders ſhall have benefit of clergy, a ſecond, third time, or oftener.

The ſtatute of 23 *H.* 8. *cap.* 1. puts clergymen in orders under the ſame pains and dangers in relation to the ſtatute of [375] 23 *H.* 8. *cap.* 1. 25 *H.* 8. *cap.* 3. as other perſons not in orders; this takes away the privilege given by 23 *H.* 8. and 25 *H.* 8.

Then by the ſtatute of 32 *H.* 8. *cap.* 3. which makes the former perpetual, it is farther enacted, "That ſuch perſons as be within "holy orders, which by the laws of this realm ought or may have "their clergy for any felonies, and ſhall be admitted to the ſame, "ſhall be burnt in the hand as lay clerks be accuſtomed in ſuch caſes, "and ſhall ſuffer and incur afterwards all ſuch pains, dangers, and "forfeitures, and be ordered and uſed for their offenſes of felony to "all intents, purpoſes and conſtructions, as lay perſons admitted to "their clergy be, or ought to be ordered or uſed by the laws and "ſtatutes of this realm, any law or ſtatute to the contrary not-"withſtanding.

This act was perpetual and ſubjected clerks in orders, notwithſtanding the ſtatute of 4 *H.* 7. *cap.* 13. to two inconveniences, *viz.* 1. To burning in the hand. 2. Excluſion of clergy a ſecond time.

But then the ſtatute of 1 *E.* 6. *cap.* 12. reſtores the privilege of clergy in all caſes, (except thoſe offenſes contained in the ſtatute of 1 *E.* 6. and expreſly excluded from clergy,) as it was before 1 *H.* 8.

And altho by this ſtatute of 1 *E.* 6. the burning of a clergyman in orders in the hand is not taken away by expreſs words, yet he is reſtored to his clergy a ſecond or other time, notwithſtanding he had formerly his clergy and was burnt in the hand.

But altho in expreſs words it reſtores not to clergymen in orders the exemption from burning in the hand given by 4 *H.* 7. *cap.* 13. yet it doth in equivalence, for it reſtores clergy in all other caſes *in like manner and form, as it was before* 1 *H.* 8. which as to clergymen in orders was without burning in the hand, and accordingly to this day their privilege in that kind continues; *vide* 2 *Co. Inſt.* 637. *Hob. Rep.* 294. *Searle & Williams.*

And tis a miſtake to ſay, that if he challenge above twenty, he ſhall loſe his clergy a ſecond time, becauſe the ſtatute of [376] 1 *E.* 6. in letting looſe the clergy in other offenſes mentions not that caſe,

caſe, for in caſe of challenging above twenty, there follows neither penance nor judgment of death, but only his challenge is overruled (*).

But indeed the caſe of outlawry is *caſus omiſſus*, for tho in the clauſe excluding clergy the word *attainder* is in, which extends to an outlawry, yet in the ſecond clauſe reſtoring clergy as it was before 1 *H.* 8. in other caſes *attainder* and *outlawry* are omitted.

As to clergy of noblemen.

By the ſtatute of 1 *E.* 6. *cap.* 12. "Peers of parliament commit-
" ting felonies within clergy may pray the benefit of this act, and
" ſhall not be put to read, nor be burnt in the hand for the firſt of-
" fenſe, without any attainder or corruption of blood to be incurred
" thereby, and for the firſt offenſe ſhall be deemed, taken and uſed as
" clerks convict, which make purgation, without any further privi-
" lege of clergy from henceforth at any time after for any cauſe to
" be allowd or admitted.

This privilege of peers to be diſcharged in this manner by this ſtatute, 1. Muſt be prayed by them. 2. Extends to all caſes, where a common perſon may have his clergy. 3. To all caſes excepted from clergy by that ſtatute, except murder and poiſoning of malice prepenſe.

But it extends not 1. To felony put out of clergy by any ſubſequent ſtatute. 2. Nor to felonies within this ſtatute, where he cannot make purgation, as if he abjure, confeſs the felony, or be outlawd, by the opinion of *Stamf. P. C. fol.* 130. *a.* but this latter ſeems doubtful, eſpecially at this day, when delivery to the ordinary and purgation are both taken away by 18 *Eliz. cap.* 7.

I think it was never meant, that a peer of the realm ſhould be put to read or be burnt in the hand, where a common perſon ſhould be put to his clergy, neither is it ſaid, that he ſhall be diſcharged by his praying the benefit of this ſtatute, where a common perſon
[377] ſhall have the privilege of clergy and may make his purgation, but only where he may have the benefit of his clergy in the firſt clauſe of the ſtatute, the other clauſe, (*ſhall be in caſe of a clerk convict, that may make purgation,*) is only for his ſpeedier diſcharge and farther advantage, and not to reſtrain the general clauſe.

(*) *Vide ſupra p.* 270, 345.

And

And therefore a great lawyer in the late times hath been much blamed for burning a peer of parliament in the hand, that confeſſed an indictment of manſlaughter; and it was the only error of note, that the perſon erred in to my obſervation.

CHAP. LII.

At what time *clergy is to be allowd.*

ANTIENTLY the law was very unſettled in this point, till ſettled by ſubſequent acts of parliament and reſolutions of the judges.

Before the ſtatute of *Weſtm.* 1. *cap.* 2. the ordinary would challenge clerks as ſoon as they were indicted, nay ſometimes, as ſoon as they were impriſond (*), before they were indicted, as appears by the ſtatute of *Marlbr. cap.* 28. *(a).*

By the ſtatute of *Weſtm.* 1. *cap.* 2. it is provided, *Que quant clerke eſt priſe pur rette de felonie & ſoit demand per l'ordinarie, il lui ſoit liuer ſolonque le privilege de Saint Eſgliſe en tiel peril come il appent ſolonque le cuſtome avant ces heures uſe,* and a direction given thereby to the ordinary, *Que ceux que ſont endites de tiel rette per ſolemne inqueſts des probes hommes fait in le court le roy, en nul manner les deliverent ſans due purgation, iſſint que roy n'eit meſtier de metter autre remedy (b).* [378]

After this ſtatute the priſoner was not only to be indicted before clergy allowd, but many times inquiſitions *ex officio* were taken (†). 1. Whether he were a clerk or no, and if not a clerk, he was not delivered to the ordinary. 2. Whether he were guilty or not, and if not guilty, he was diſcharged. 3. If found guilty, he was then delivered to the ordinary. *vide* 2 *Co. Inſt.* 164. 8 *E.* 2. *Coron.* 417. 17 *E.* 2. *Coron.* 386. 3 *H.* 7. 12. *b.* but his goods were ſeiſed.

But this was found a great inconvenience to the priſoner, becauſe in caſe of an inqueſt of office he loſt his challenges, and beſides poſſibly he might be quit of the felony, were he put upon the jury.

(*) *Vide Bract. Lib.* III. *f.* 123. *b.*
(a) 2 *Co. Inſt.* 150.
(b) 2 *Co. Inſt.* 163.

(†) *Vide Part* I. *p.* 180. *in notis. p.* 343. *in notis, & ſupra p.* 318. *in notis.*

And

And therefore in the time of *H.* 6. the court was changed by *Prisot*, and the priſoner hath been always ſince put to plead to the indictment, and if convict, then to pray his clergy: *vide* 3 *H.* 7. 12. *b. Stamf. P. Co. fol.* 131. *a.* 11 *Co. Rep. Poulter's* caſe.

But if the priſoner will wave that advantage and will pray his clergy, he may, for no law ouſts him of it, but then, if the indictment be out of clergy, he muſt anſwer to the felony, or he ſhall have his penance.

But at this day clergy is never granted, unleſs the party confeſs the felony, or be convict by verdict.

If a man be indicted of a felony within clergy, and he plead and be convict, and it be demanded of him, what he can ſay why judgment ſhould not be given againſt him, he may pray his clergy, tho there be no ordinary to demand him, for as ſhall be ſaid in this caſe, the ordinary is but the miniſter of the court, and it is not now, as antiently, uſed for the ordinary to demand a priſoner, but he may pray his clergy himſelf.

If in that caſe the ordinary demand not the priſoner, nor the priſoner himſelf prays his clergy, yet if it appear to the court, that he is [379] a clerk, or be ſo named in the indictment or appeal, the court may, and it ſeems ought *ex officio* to allow him his clergy, but howſoever they thought not to execute him. 22 *E.* 3. *Coron.* 254. *Abridg. Aſſiz.* 74. *(c)*.

If by any miſtake or overſight the court ſhould give judgment againſt him, yet they may, (and as I think,) ought to allow him his clergy after his attainder.

And therefore the priſoner condemned ſhall in ſuch a caſe be allowd his clergy under the gallows, if the judge come that way, 34 *H.* 6. 49. *a. b.* This is agreed may be done by the judges of the king's bench, as juſtices of peace, becauſe their commiſſion continues, but it is doubted, how it can be done by juſtices of *oyer* and *terminer* after their ſeſſion ended. *Crompt. Juſt.* 119. *a.*

And it is true, that tho they may allow clergy during the adjournment of their commiſſion, yet they cannot do it after their ſeſſion is over, but they may reprieve him after judgment, notwithſtanding their ſeſſion determined, upon conſideration that he can read, and then may allow him his clergy as a clerk attaint at the next ſeſſion. 3 & 4 *Eliz. Dy. a.*

(c) This caſe is in 12 *Aſſiz.* 15.

A. is

A. is indicted of a felony within clergy, and hath his book delivered him but cannot read, and the ordinary returns accordingly *non legit*, and it is entered of record *non legit*, and the court reprieves him till another seſſions, and by that time he hath learned to read, tho the gaoler, that taught him to read in the mean time, was antiently puniſhable, yet he ſhall be admitted to his clergy and be delivered. 27 *Aſſiz.* 44. *n.* 11. *Dy.* 205. *a. b. per omnes juſticiarios*, *Dy.* 214. *b. Stone*'s caſe.

And the ſame law it is, if judgment of death were entered againſt him upon *non legit* returned, yet if he can read after, he ſhall be delivered to the ordinary and have his clergy *per omnes juſticiarios.* 34 *H.* 6. 49. *Coron.* 20 (*).

If a man abjure the kingdom, (which is an attainder in law,) and come back again, he ſhall have the privilege of his clergy, as a clerk attaint. 8 *H.* 6. *Kelw.* 186. *b. Raſt. Entr. fol.* 1. *b.*

But in antient time he was not delivered to the ordinary, but remanded to priſon till he obtained the king's pardon for [380] returning into the kingdom without licence, and that being obtained he ſhould be delivered to the ordinary, 1 *E.* 3. 16. *b. Coron.* 155. *Stamf. P. C. Lib.* II. *cap.* 50. but this law is antiquated: *vide Raſt. Ent. fol.* 1. *b. ex T.* 15 *H.* 7. *rot.* 2.

If a man indicted of a felony within clergy ſtands mute, yet he ſhall have his clergy. *Moore*'s *Rep. n.* 738. *p.* 550. *Winter*'s caſe, yea tho judgment of *peine fort & dure* were given againſt him, if the caſe, as it appears upon the indictment, be within clergy, for the court in this caſe ought to be of counſel with the priſoner *in favorem vitæ*, tho he be wilful.

If the approver diſavow his appeal, or be vanquiſhed in battle, or become recreant therein, yet he ſhall have the privilege of clergy, if the cauſe, for which he is indicted, be within clergy.

But in theſe caſes of attainder antiently they were delivered to the ordinary *abſque purgation.* 15 *H.* 7. *Raſt. Ent.* 1. *b.*

(*) Theſe points cannot now come in queſtion, for the neceſſity of reading is entirely taken away by 5 *Ann. cap.* 6.

CHAP.

CHAP. LIII.

Concerning the manner how, *and* the judge by and before whom *clergy is to be prayed or allowd.*

ANTIENTLY the ordinary took upon him, as the perſon that was to judge of the competency or incompetency of the clerk. But in truth the king's juſtices were the judges both touching the competency of the clerk to be admitted, and the ſufficiency or inſufficiency of his performance therein, and the ordinary was in truth but the miniſter to the court. 5 *Co. Rep.* 26. *b. caſe of eccleſiaſtical law (a).*

[381]

If the ordinary had challenged one as a clerk, that the court judged not to be ſuch, the ordinary or biſhop ſhould be fined, and his temporalties ſeiſed, 7 *H.* 4. 41. *b. Stamf. P. C.* 132, 133, and the felon ſhall be hanged. 7 *E.* 4. 29. *a.* 9 *E.* 4. 28. *a.*

Again, if the ordinary refuſe one that can read, and return *non legit*, yet the court may hear him, and if they judge him to read ſufficiently, the priſoner ſhall be ſaved notwithſtanding the refuſal and return of the ordinary, and accordingly, if the ordinary be abſent, the court may give him his book. 7 *E.* 4. 29. *a.* 9 *E.* 4. 28. *a.* 7 *H.* 4. 41. *b.* 34 *H.* 6. 49. *a. b. Stamf. P. C. Lib.* II. *cap.* 45. *fol.* 132, 133.

And therefore the judge may and uſually doth appoint the verſe, that the clerk ſhall read, *Stamf. P. C. ubi ſupra*, and therefore the practice of *Bryan* and *Starkey*, 21 *E.* 4. 21. is juſtly reprovable, who when they delivered a book to the priſoner and he read well in the preſence of the juſtices, yet when the ordinary returned *non legit*, gave judgment of death againſt the priſoner, for in truth the ordinary is but the miniſter, or at moſt the aſſiſtant to the court, and not the judge. *Hob. Rep. p.* 290. *Searle & Williams (b).*

(a) Vide Kel. 28. 51.

(b) But this learning is now out of uſe, for by 5 *Ann. cap.* 6. every perſon convicted of a felony within the benefit of clergy ſhall, upon praying the benefit of that ſtatute, without any reading, be allowd to be, and be puniſhed as a clerk convict, and this ſhall be as effectual and advantageous to him, as if he had read as a clerk.

CHAP. LIV.

Concerning the conſequences *of* clergy *granted or prayed.*

THE conſequences or effects upon clergy granted are conſiderable in two ways, 1. What they were before the ſtatute of 18 *Eliz.* and 2. What ſince.

Touching the conſequences of clergy before the ſtatute of 18 *Eliz.* they were theſe.

I. Regularly when clergy was granted, there was an entry made by the court of king's bench, *Et' tradito ei hic per curiam libro legit ut clericus*, & J. S. (the ordinary or his deputy,) *petit ipſum, ut clericum, præfato ordinario deliberari, ideo conſideratum eſt, quòd prædictus* A. B. *liberetur præfato ordinario.* And if it be without purgation, then there is this added, *ſalvo cuſtodiend' abſque aliqâ purgatione inde de cætero faciend' ſub periculo, quod incumbit.* 17 *H.* 7. *Rot.* 2. *Raſt Entries* 121. *a.* But if it be not without purgation, then that clauſe is omitted.

This is the form of the award in the king's bench, but before juſtices of gaol-delivery the entry commonly is, *Et traditur ordinario*, either generally or *abſque purgatione*, as the cauſe requires. *M.* 2 & 3 *Eliz. Dy.* 205. *b.* & *ibid.* 215. *a.*

II. When he was ſo delivered to the ordinary, he was to remain in the ordinary's priſon; *viz.* if committed generally, then he was to remain till he had made his purgation, if *abſque purgatione*, then he was to remain there during his life, unleſs the king pardon him,

And if the clerk had broke priſon, this was not a felony within the ſtatute of 1 *E.* 2. *de frangentibus priſonam* (*); but if the clerk were attaint and delivered to the ordinary and broke priſon and eſcaped, and were after taken, he ſhould have been executed [383] upon his firſt attainder, *quod vide* 27 *Aſſiz.* 42.

But by the ſtatute of 23 *H.* 8. *cap.* 11. if ſuch a clerk break the priſon of the ordinary and eſcape, this is made felony without clergy; only the clerk, if in orders, being convict was to be delivered to the ordinary without purgation, and he might, if he pleaſed, degrade him and ſend him into the king's bench with letters ſignifying his degra-

(*) Becauſe that ſtatute was conſtrued to extend only to the *king's priſon: vide Part* I. *p.* 608.

ding, and that court, have the record of the conviction before them, might give judgment and award execution, as if he had been a layman and found guilty before them.

But this among the reſt of the felonies enacted in the time of *H.* 8. was repealed by 1 *E.* 6. *cap.* 12. & 1 *Mar. cap.* 1.

III. If the clerk were committed generally, he might make his purgation (*), the form whereof is unneceſſary to recite, being it is now taken away by 18 *Eliz.* and is fully deſcribed and directed by *Stamford Lib.* II. *cap.* 48. *fol.* 138. and the ſtatutes of *Weſtm.* 1. *cap.* 2. 4 *H* 4. *cap.* 3.

And if the ordinary would not admit a clerk to his purgation, a writ might iſſue out of the chancery to command it, where by law it might be done. 15 *H.* 7. 9. *a. per Fineux.*

And when he had made his purgation, he had always reſtitution of his *lands* ſeiſed, unleſs he were attaint. 8 *E.* 2. *Forfeiture* 34.

But as touching *goods* the difference was thus:

If before conviction upon his arraignment the priſoner had his clergy, (as was uſed commonly before the time of *H.* 6.) then if he made his purgation, upon ſignification thereof to the chancery he had a writ to the ſheriff to reſtore him his goods, *niſi eâ de cauſâ fugam fecerit*, for then he had no reſtitution, *F. N. B.* 66. *a.* but if he died before purgation, his executors could not have it.

But if he had pleaded to inqueſt, and were convict, then the goods
[384] were forfeited by the conviction, and he ſhould not have reſtitution of his goods upon his purgation, and altho the law was taken antiently, that even in caſe of a conviction, unleſs there were an attainder alſo by judgment, he ſhould upon his purgation have had reſtitution. 3 *E.* 3. *Coron.* 365. 40 *E.* 3. 42 *a.* yet of latter times the law hath conſtantly obtained otherwiſe, as appeareth 8 *H* 4. 2. *a.* 20 *E.* 4. 5. *B. Coron.* 166. *Plow. Com.* 262. *b. Stamf. P. C. Lib.* III. *cap.* 23. *vide* 3 *E.* 3. *Coron.* 332.

And the ſame law ſeems to be, if he come not *in* upon the *exigent* awarded, if he fled, if he ſtood mute, or challenged above thirty-five, for in all theſe caſes he forfeited his goods, and ſhould not have reſtitution upon his purgation, *vide* 8 *E.* 2. *Coron.* 417. where, tho he prayed his clergy before conviction, yet upon an inqueſt of office find-

(*) This was a trial before the ordinary by a jury of twelve clerks, wherein if he was acquit, he was diſcharged: if found guilty, he was degraded.

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ing him guilty he forfeited his goods; the like *H.* 17. *E.* 2. *B. R. rot.* 87. *Heref.* in the biſhop of *Hereford*'s caſe before cited *cap.* 44. *p.* 326.

But if the clerk were delivered to the ordinary *abſque purgatione*, there he continued priſoner during his life, unleſs pardoned by the king, and the king had not only his goods, as abſolutely forfeited, but alſo the profits of his lands during his life, as appears by the books above cited.

And if the clerk were ſo delivered *abſque purgatione*, if the ordinary went about to admit him to purgation, a writ might iſſue out of the chancery to prohibit him. *Clauſ.* 22 *H.* 3. *m.* 17. *dorſo*, *Epiſcopo Exon. H.* 14. *E.* 3. *B. R. rot.* 19. *Lond'* and he ſhall for it be fined, and his temporalties ſeiſed for the contempt, and by ſome books it is an eſcape in the ordinary. 9 *E.* 4. 28. *a.*

There were certain caſes, wherein the clerk was delivered to the ordinary *abſque purgatione.* 1. Where he was outlawed of felony 23 *H.* 8. *cap.* 1. *Raſt. Entries* 121. *a.* 2. Where he confeſſed the felony either upon his arraignment, or become an approver, or confeſſed and abjured and after came into the realm again, for againſt his own confeſſion he ſhould not be admitted to purge himſelf of the crime he confeſſed. 3 *H.* 7. 12 *a.* 3. If he had judgment given againſt him, whereby he was attaint. 10 *E.* 3. *Coron.* 247. 4. If he were in orders and broke the priſon of the ordinary and made his eſcape, by the ſtatute of 23 *H.* 8. *cap.* 11. [385] 5. Where a man in orders was convict of any of the felonies ouſted of clergy by 23 *H.* 8. *cap.* 1. he was to remain during his life without purgation, and the ordinary might degrade him and ſend him into the king's bench to receive judgment. 6. If he were only convict by verdict in an appeal, he ſhould not make his purgation. 12 *R.* 2. *Coron.* 109. 10 *E.* 2. *Coron.* 247.

IV. If a felon had his clergy, regularly he was never to be arraigned again before the king's juſtices for the ſame felony, unleſs it were in caſe where he broke the priſon of the ordinary and eſcaped. 20 *E.* 2. *Coron.* 232. *(a).*

V. If a clerk had his clergy for felony, he was not to be arraigned for any other felony by him committed before his clergy allowed, for by the ſtatute of 25 *E.* 3. *cap.* 5. *pro clero*, it is enacted, "That he

(a) For in that caſe *eccleſia iſtum tueri non debet, vide Bracton, Lib.* III. *de coro ä.* *f.* 131. *a.*

" ſhall be arraigned of all his felonies at once *(b)*," yea and altho he only prayed his clergy, tho there be no entry of record, that he read or was delivered to the ordinary, yet by force of this ſtatute he ſhall not be arraigned of any felony committed before, for the firſt felony being within clergy, and he praying his clergy, it was the fault of the court, that he had it not, which ſhall not turn to his diſadvantage. *T.* 4 *Eliz. Dy.* 214. *b. Stone*'s caſe.

Yet this hath ſome exceptions, for if he had committed treaſon againſt the king before his clergy admitted, he may after his clergy and after his purgation alſo be indicted and arraigned for that treaſon, becauſe it was an offenſe not within benefit of clergy.

VI. If he had committed a felony after he had his clergy, and was delivered to the ordinary, he ſhould be put to anſwer that felony, *vide* 4 *Eliz. Dy.* 214. *b.* and if he had killed his keeper and thereby eſcaped
[386] of the ordinary's priſon, he ſhould not for that felony have had his clergy for it, *fruſtra legis auxilium quærit, qui in legem committit.* 8 *E.* 2. *Coron.* 419. 22 *E.* 3. *Coron.* 250.

The caſe of *Stone*, 4 *Eliz. Dy.* 214. *b.* was this.

Stone committed two felonies the ſame day, one (ſuppoſe it burglary) out of clergy, the other (ſuppoſe it larceny) within clergy, he is indicted of the larceny, he pleaded and was convict, and prayed his clergy, and entered *non legit ut clericus*, and no judgment, *quòd tradatur ordinario*, but is reprieved without judgment to another ſeſſions, at which he is indicted of the other felony out of clergy, but ſuppoſed to be the ſame day when the former felony was committed, he is arraigned and pleads *non culp*, and is found guilty, *& petit librum & legit ut clericus, ſed non crematur, neque traditur ordinario.*

1. It was agreed, that this ſecond reading, notwithſtanding the *non legit* firſt entered, is a good diſcharge of the firſt felony within clergy *per omnes juſticiarios*, *Dy.* 205. *a. b.* but then, 2. The queſtion was, what ſhould be done as to the ſecond not within clergy, whereof he was indicted and convicted: by ſeven juſtices he ſhall have judgment to die, becauſe it ſhall be intended a felony committed after the firſt arraignment, but by other ſeven he ſhall be diſcharged, for it ſhall be intended a felony committed the ſame day, as it is laid, and tho there be no award, *quòd tradatur ordinario*, yet that was the act of the court

(*b*) This ſtatute was only in affirmance of the common law, for he was to be degraded by the ordinary, and this was thought a ſufficient puniſhment for all offenſes committed before degradation; *vide Bracton Lib.* III. *de coronâ, cap.* 9. *f.* 123. *b.*

and

and ſhall not prejudice him; but he ſhall be adjudged in the cuſtody of the ordinary from the firſt prayer of his clergy.

But afterwards 28 *Maii* 8 *Eliz.* he was indicted for murder committed the firſt of *April* 1 *Eliz.* and was convict and had judgment, and was executed, and yet that murder was before his clergy prayed, and before the ſtatute of 2 *Eliz. cap.* 4. therefore it ſeems the former opinion obtained, for if he had been diſcharged by his reading as to the felony, whereof he was firſt indicted, he muſt have been diſcharged of all felonies committed before his firſt arraignment. The only ſalve that I can think of is either, 1. That he ſhould have *pleaded* it, and did not; or 2. That the *legit ut clericus* muſt be intended to be applied to the ſecond felony only, and not to the firſt, whereupon *non legit* was entered. *Dy.* 215. *a.* [387]

And thus far touching the effect of clergy, as it ſtood before 8 & 18 *Eliz.*

By theſe two ſtatutes two great alterations were made in the whole buſineſs of clergy, which took away many of thoſe intricate queſtions, tedious proceedings, and great inconveniencies, that were therein before this time.

1. By the ſtatute of 3 *Eliz. cap.* 4. it is enacted, "That every "perſon, which ſhall hereafter upon his arraignment for any felony "be admitted to the benefit of clergy by the laws of this realm, and "delivered to the ordinary for the ſame, and ſhall make his due purga- "tion for the ſame offenſe or offenſes, whereupon he was ſo admitted "to his clergy, and ſhall before his admiſſion to his clergy have com- "mitted any other ſuch offenſe, whereupon clergy by the laws or "ſtatutes of this realm is not allowable, and not being thereof before "indicted and acquitted, convicted, or attainted, or pardoned ſhall "and may be indicted or appealed for the ſame, and thereupon put to "anſwer, and ordered and uſed in all things according to the laws "and ſtatutes of this realm in ſuch manner and form, as tho no ſuch "admiſſion to clergy had been.

By this ſtatute, tho all other felonies within clergy before clergy admitted ſtand diſcharged, as they were at common law, yet felonies out of clergy committed before clergy allowed may ſtill be proſecuted, notwithſtanding clergy allowed, and ſo as to ſo much it repealed the ſtatute of 25 *E.* 3. *pro clero, cap.* 5.

Then at the parliament of 18 *Eliz. cap.* 7. it is enacted, "That "every perſon, which at any time hereafter ſhall be admitted and al-

" lowed to have the privilege of clergy, ſhall not thereupon be deliver-
" ed to the ordinary, as hath been accuſtomed, but after ſuch clergy
" allowed, and burning in the hand according to the ſtatute in that
" behalf provided, ſhall forthwith be enlarged and delivered out of
" priſon by the juſtices, before whom ſuch clergy ſhall be granted,
[388] " that cauſe notwithſtanding, provided, that the juſtices may
" for farther puniſhment detain the clerk in priſon for any
" time not exceeding one year *(c)*.

" Provided that, if any one ſhall be convicted of carnal knowledge,
" and abuſing a woman child under ten years, ſuch offenſe ſhall be
" felony without clergy.

" Provided, that any perſon admitted to the benefit of clergy ſhall
" notwithſtanding the ſame be put to anſwer other felonies, whereof
" he ſhall be indicted or appealed, not being thereof before acquitted,
" convicted, attainted, or pardoned, and ſhall in ſuch manner be ar-
" raigned, tried, adjudged, and ſuffer ſuch execution for the ſame, as
" he or they ſhould have done, if as a clerk or clerks convict they had
" been delivered to the ordinary, and there had made his or their due
" purgation.

Upon this ſtatute theſe points are clear.

1. That if before his clergy admitted, he had committed any other felony within clergy, he is cleared of them as well as of that whereupon he hath his clergy, for his burning in the hand is in lieu of his delivery to the ordinary and purgation.

2. That as to former felonies out of clergy he is not diſcharged by his admiſſion to clergy, but ſhall be put to anſwer them.

3. That by his conviction he forfeits all his goods that he hath at the time of the conviction, notwithſtanding his burning in the hand.

(c) By 5 *Ann. cap.* 6. it is enacted, " That where any perſon ſhall be convict " of larceny the judges ſhall award him to " the work-houſe or houſe of correction, " there to be kept without bail at the diſ- " cretion of the judges, not leſs than ſix " months, nor more than two years from " the conviction, an entry whereof is to be " made on record, and if ſuch offender " eſcapes he ſhall be committed to ſuch " houſe there to remain not leſs than " twelve months, nor more than four " years.

By 4 *Geo.* 1. *cap.* 11. and 6 *Geo.* 1. *cap.* 23. " The court may order any perſon " convicted of larceny, or any felonious " ſtealing of money, &c. within clergy, " (except perſons convict for receiving " ſtolen goods, knowing them to be ſtolen,) " inſtead of being burnt in the hand or " whipt, to be tranſported to any of his " Majeſty's plantations in *America*, for " the ſpace of ſeven years; and perſons " convict for receiving ſtolen goods, know- " ing them to be ſtolen, or for offenſes " without clergy, but pardoned generally " upon condition of tranſportation, to be " tranſported for the term of fourteen " years; and if any ſhall reſcue or aid " ſuch offender to make his eſcape, or if " ſuch offender ſhall return or be found at " large without leave before the expiration " of his term in *Great Britain* or *Ireland*, " he or they ſhall be deemed guilty of " felony without clergy.

4. That

4. That yet by his burning in the hand he is put into a capacity of purchaſing and retaining other goods, becauſe the ſtatute taking away delivery to the ordinary and purgation, which ſhould have reſtored him to that capacity, gives him the capacity of purchaſing and retaining other goods, and is in nature of a pardon.

5. That preſently upon his burning in the hand he ought to be reſtored to the poſſeſſion of his lands, and from thenceforth to enjoy the profits thereof.

6. That altho he be not burnt in the hand, but the king pardons it, he is thereby put into the ſame condition, as if he were burnt in the hand, and rendered a perſon capable now to purchaſe and retain goods, altho the words of the ſtatute are *after clergy allowed and burning in the hand he ſhall be delivered.* Theſe are all points reſolved in 5 *Co. Rep.* 110. *a. Foxley*'s caſe, and *P.* 41 *Eliz. Heſton*'s caſe therein cited (*).

7. And conſequently after clergy and burning in the hand he ſhall not be proceeded againſt by the eccleſiaſtical judge to deprivation or other eccleſiaſtical cenſure, for it amounts to a pardon by the king. *Hob. Rep. p.* 288. *Searle & Williams.*

8. That notwithſtanding this ſtatute requires burning in the hand to diſcharge a clerk convict, yet a clerk in holy orders, *viz.* in the order of ſubdeacon or above ſhall not be burnt in the hand, but the privilege allowed them by the ſtatute of 4 *H.* 7. *cap.* 13. to be ſaved from burning in the hand continues to them. 2 *Co. Inſt.* 637.

9. And upon the ſame account they may have their clergy in caſes within clergy a ſecond time according to the ſtatute of 4 *H.* 7. *cap.* 13. notwithſtanding this ſtatute.

10. That altho a clergyman in orders ſhall not be burnt in the hand, yet by virtue of the ſtatute 4 *H.* 7. *cap.* 13. and of this ſtatute after his diſcharge given by the court he ſhall have the ſame privilege as if he had been burnt in the hand, and therefore ſhall not be drawn in queſtion in the eccleſiaſtical court to deprive him or inflict any eccleſiaſtical cenſure upon him. *Hob. Rep.* 288. *Searle & Williams.*

11. That notwithſtanding this ſtatute takes away delivery to the ordinary, and inflicts burning in the hand, yet the [390] privilege of peers of parliament exempting them from reading and burning in the hand for the firſt offenſe is not hereby at all diminiſhed or altered.

(*) *Vide ſupra p.* 278.

12. That the plea of *auterfoits convict* and had his clergy ſtands as a good bar to a new arraignment for the ſame felony, as it did before this ſtatute.

13. That if a man be indicted of murder, and upon not guilty pleaded is found guilty of manſlaughter, and prays his clergy, tho he neither be burnt in the hand, nor hath his clergy allowed, but the court will adviſe upon it, yet this ſtands as a good bar to a new indictment or appeal for the ſame felony, for the priſoner hath done what he can in praying his clergy, which prayer is recorded *petit librum*, and it is the act of the court to adviſe, and their delay in allowing him clergy, or burning him in the hand ſhall not prejudice the priſoner. 4 *Co. Rep.* 45. *b. Wigg*'s caſe and *Holcroft*'s caſe adjudged. *Co. P. C. cap.* 57. *p.* 131. *(d).*

(d) This point was however much litigated, and at laſt ſolemnly ſettled in the caſe of *Armſtrong* and *Liſle T.* 8 *W.* 3. *B. R. rot.* 565. *Kel.* 93. that a conviction of manſlaughter, and that he was a clerk and ready to read, if the court would have allowed him, is a good bar to an appeal, altho the court had not called the defendant to judgment, but continued him over with a *curia adviſare vult.*

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[391]

CHAP. LV.

Concerning judgments *in the ſeveral kinds of* capital offenſes.

HAVING now gone through the preparatories to judgment, namely indictment, pleas, trial, and clergy, I come to conſider of the judgments that are to be given in ſeveral capital offenſes, and therein, 1. I will conſider the ſeveral kinds of judgments. 2. Who are the judges, that may give them. 3. How and in [what manner.]

Firſt, for the ſeveral kinds of judgments I ſhall conſider theſe particulars.

1. What judgment is to be given in caſe of an acquittal of any capital offenſe.

2. What, when clergy is allowed.

3. What to be given againſt a perſon convicted of treaſon, as againſt the king.

4. What to be given in caſe of petit treaſon.

5. What, in caſe of felony.

6. What, in caſe of *peine fort & dure.*

I. The

I. The judgment *upon the acquittal* of the priſoner is either when he is acquitted by ſpecial plea, as of *auterfoits acquit*, or of a pardon, *&c.* or other matter in bar, or elſe when he is acquitted upon not guilty pleaded; and of theſe in their order.

If the priſoner pleads the king's pardon, the concluſion of his plea is ordinarily thus, *quarum quidem literarum domini regis (ac dicti brevis* if there be a writ of allowance alſo pleaded,) *prætextu prædictus* T. H. *petit quòd ipſe de præmiſſis per curiam hìc dimittatur, &c. ſuper quo viſis & per curiam hìc intellectis omnibus & ſingulis præmiſſis conſideratum eſt, quòd prædictus* T. H. *eat inde ſine die, &c.* and in the margin of the roll there is commonly entered *literæ patentes allocantur: ſine die, &c.* and no other judgment is uſually entered in ſuch caſe. *Raſt. Entries* 455. *a. b.* [392]

If the priſoner pleads *auterfoits acquit*, or *convict*, or *attaint de meſme felony*, and avers it to be the ſame, (as he muſt,) the concluſion of his plea is, *& hoc paratus eſt verificare, unde petit judicium, & quòd ipſe de præmiſſis per curiam hìc dimittatur*, and ſometimes and moſt commonly pleads over to the felony *not guilty*.

Et David Waterhouſe *armiger. coronator & attornatus domini regis in curiâ ipſius regis coràm ipſo rege, qui pro eodem domino rege in hâc parte ſequitur, pro eodem domino rege dicit & cognovit, quòd prædictus* Johannes Sayer, *qui modo comparet, & prædictus* Johannes *in inquiſitione prædictâ nominatus per nomen* Johannis Sawyer, *nuper de* W. *in com.* S. *&c. eſt una & eadem perſona*, and ſo goes along to all the averments *modo & formâ, prout prædictus* Johannes Sayer *ſuperiùs placitando allegavit, ſuper quo viſis & per cur' hìc intellectis omnibus ſingulis præmiſſis tàm in placito prædicto ipſius* Johannes Sayer *in formâ prædictâ placitat' & accordo convictionis prædict. quàm dicti domini regis attornati ejuſdem placiti cognitione, conſideratum eſt, quòd prædictus* Johannes Sayer *eat inde ſine die* H. 5 Jac. *B. R. Sayer's* caſe, where he pleaded *auterfoits convict* and had his clergy.

And judgment is in like manner entered, *H.* 6. *Jac. B. R.* in the caſe of *Francis Smith* upon *auterfoits acquit* pleaded, *Et* David Waterhouſe *armiger, qui pro domino rege in hâc parte ſequitur, viſo placito prædicti* Franciſci Smith *& diligenter per ipſum examinat' præmiſſis, pro eo, quòd evidenter & manifeſtè apparet eidem* David Waterhouſe, *quòd placitum prædictum per præfatum* Franciſcum *ſuperiùs placitatum &c. hoc non dedicit ſed placitum illud ex parte dicti domini regis in omnibus fatetur, & cognovit fore verum: Ideò ut ſupra eat ſine die.*

The

The like form of judgment, *viz. quòd eat ſine die* was antiently uſed in caſe of *auterfoits acquit* pleaded. 2 *E.* 4. *John Hodgſon*'s caſe.

And *note*, this judgment of *eat ſine die* is of two kinds, ſometimes it is ſpecial, ſometimes it is general.

[393] If *A.* bring an action of covenant againſt *B.* and a ſpecial verdict is found, but upon the peruſal of the declaration a fault therein appears, *Et quia videtur curiæ, quòd narratio eſt inſufficiens, conſideratum eſt quòd querens nihil capiat per billam, ſed quòd defendens eat indè ſine die*, this judgment ſhall not be a bar in another action; becauſe ſpecial, and not given upon the verdict, but upon the inſufficiency of the declaration; otherwiſe it had been, if given generally, for it ſhould have been intended upon the verdict and merits of the cauſe. *T.* 1650. *Eales* & *Lambert (a)*.

In a *quare impedit* by the king iſſue is joined and found for the defendant, at the day in bank it is alleged in arreſt of judgment, that no patron is named in the writ, the judgment ſhall be enterd generally, *quòd eat ſine die*, and not ſpecially upon the plea in abatement, but it ſeems, it ſhall not bar the king in a new action, for the *eat ſine die* ſhall be applied to the plea to the writ: *vide* 3 *H.* 4. 2 & 11. *(b.)*

But it ſeems, that if a man pleads a plea in bar of the indictment, as *autrefoits acquit*, or a pardon, yet if the indictment be inſufficient, upon the reaſon of *Vaux*'s caſe 4 *Co. Rep.* 45. *a.* the *eat ſine die* ſhall be applied for the advantage of the king to the inſufficiency of the indictment, and not to the plea in bar; *quære tamen, non obſtante Vaux*'s caſe.

It is reaſon to have the *eat ſine die* ſpecial in that caſe, *eò quòd indictamentum prædictum apparet minùs ſufficiens, ideò conſideratum eſt, quòd eat ſine die*, and then it is applicable only to the inſufficiency of the indictment.

(a) This caſe (but not this point) is reported in *Styl.* 37, 54, 73.

(b) This caſe, (which is obſcurely ſtated by our author,) appears from the year-book to have been thus. A *quare impedit* was brought by the king, and a verdict paſſ for the defendant, upon which the defendant prayed judgment, but the counſel for the king deſired, that the writ might abate, becauſe it was brought againſt the incumbent only, and not againſt the patron, but this was refuſed, becauſe the king was eſtopped from abating his own writ; then they prayed, that if judgment were enterd againſt the king, the cauſe thereof ſhould likewiſe be enterd, but this alſo was refuſed by the court as needleſs, and the judgment enterd generally, *quòd defendens eat ſine die*, (the ſame judgment, that ſhould be in caſe the writ had been brought againſt the patron and incumbent, and it had been found againſt the king,) becauſe the king will receive no prejudice thereby, for if this judgment ſhould afterwards be pleaded in bar, the king might reply, that judgment was given againſt the writ, becauſe the patron was not named therein.

If

If a man plead not guilty and is acquitted, antiently the judgment was not only, *quòd eat ſine die*, but *ideò conſideratum eſt, quòd eat indè quietus*, tho it were at the king's ſuit, *quod vide Raſt. Entries* 51. *a.* 2 *E.* 4. in the caſe of *Hodgſon* before cited, and ſo in the caſe of *Smith* before cited, *viz. H.* 6 *Jac.* and accordingly *H.* 6 *Jac. B. R. Raſt. Entries* 57. *Ideò conſideratum eſt, quòd idem T. ſit inde quietus, & eat ſine die. Raſt. Entries, fol.* 385. *Gaol-delivery* 6, 7, 10, 11.

Yet at common law without the aid of 18 *Eliz.* he might be bound bound to his good behaviour, if it were teſtified he was of ill fame, and ſhall be committed till he find ſureties. *Raſt. Ent.* 385. *Gaol-delivery* 5.

And if the entry were ſuch, I do not think the priſoner could ever be arraigned again notwithſtanding the inſufficiency of the indictment, till that judgment of acquittal were reverſed, for *eat inde quietus* cannot go to the inſufficiency of the indictment, but muſt go to the matter of the verdict.

But indeed in *Vauxe*'s caſe, 4 *Co. Rep.* 44. *a.* who was acquit by verdict upon *not guilty* pleaded, the judgment is only *Ideò conſideratum eſt, quòd prædictus* Willielmus Vaux *de feloniâ & murdro prædicto in indictamento prædicto ſuperiùs ſpecificat. necnon de dictâ felonicâ venenatione prædicti* Nich. Ridley *in eodem indictamento nominat. eidem* Willielmo *impoſit. eat ſine die*, not *eat inde quietus:* he was afterwards indicted *de novo* and pleaded the former acquittal, and yet becauſe the indictment was not ſufficient, he was put to plead to the felony, and had judgment and was executed.

The truth is the beſt reaſon to maintain that judgment is that, which is given by my lord *Coke P. C.* 214. in theſe words, *In the caſe of acquittal the judgment is*, quòd eat ſine die, *which may be given as well for the inſufficiency of the indictment, as for the party's innocence or not guiltineſs of the offenſe, and the judges of the cauſe ought before judgment to look into the whole record, and upon due conſideration thereof to cauſe it to be enterd*, ideò conſideratum eſt, quòd eat ſine die.

This is the beſt reaſon to ſupport that judgment, but if the judgment had been, *quòd eat indè quietus*, as the antient form is in caſe of acquittal upon *not guilty pleaded*, that could never refer to the defect of the indictment, but to the very matter of the verdict; and if in *Vaux*'s caſe the judgment had been ſo enterd, he could never again have been indicted for the ſame offenſe, notwithſtanding [395]

the

the defect of the indictment, till that judgment reverſed by writ of error, tho, as it was, that judgment in *Vauxe*'s caſe was one of the hardeſt that ever I met with in criminal cauſes, for where the priſoner excepts to the inſufficiency of the indictment, or the court doth it *ex officio*, the judgment is ſpecial, *quòd indictamentum ob inſufficientiam caſſetur, & quòd* the priſoner *eat indè ad præſens ſine die.*

If a man be indicted of homicide *ſe defendendo*, or *per infortunium*, he muſt plead to it or confeſs it, and there is no judgment of death given againſt him, but *remittitur priſonæ*, or baild *ad expectand. gratiam regis.*

But if a man by the coroner's inqueſt be found to have kild a thief, that aſſaulted him to rob him or to commit a burglary, which is not felony, he ſhall neither be arraigned nor put to anſwer upon that indictment, but ſhall be diſmiſſed without any judgment.

But if he had been indicted of murder or manſlaughter, and upon *not guilty* pleaded the ſpecial matter is found, or the jury acquits him, the judgment ſhall be *quod eat indè quietus*, and it is a perpetual diſcharge; and if he be found guilty *ſe defendendo*, yet the judgment given thereupon, *quod expectet gratiam regis* is a perpetual bar to another indictment. *Co. P. C. cap.* 101. *p.* 213, 214.

II. The judgment in caſe of allowance of clergy is thus, *Super quo adtunc & ibidem quæſitum eſt per cur. domini regis de eodem* Johanne, *ſi quid pro ſe habeat vel dicere ſciat, quare curia domini regis hic ad judicium & executionem de eo ſuper veredictum prædictum procedere non debeat*; *idem* Johannes *dicit, quòd ipſe eſt clericus, & petit beneficium clericale ſibi in eâ parte allocari, & tradito eidem* Johanni *libro idem* Johannes *legit ut clericus, ſuper quo conſideratum eſt per curiam hic, quòd idem* Johannes *in manu ſuâ lævâ cauterizetur & deliberetur*, and the execution is accordingly enterd, *& inſtanter crematur in manu ſuâ lævâ, & deliberatur juxta formam ſtatuti.*

[396] And if he be a nobleman, and be demanded wherefore judgment ſhould not be given upon the verdict, he may aver, that he is a peer of the kingdom *habens locum & vocem in parliamento*, and pray the benefit of the ſtatute of 1 *E.* 6. *cap.* 12. and if it appear ſo in the indictment, or in caſe it do not, if the court be aſcertained thereof either by writ of *certiorari* to the clerk of parliament, or if it be confeſſed by the king's attorney, then the judgment is *ideò conſideratum eſt quòd deliberetur ſecundùm formam ſtatuti in hujuſmodi caſu edit. & proviſ.*

And

And if it be alleged, that he is a clerk in holy orders, then it ſhall be enterd after his reading, *Et quia curiæ hic conſtat per certificationem Epiſcopi, &c.* or *per literas teſtimoniales Epiſcopi, quòd ipſe eſt clericus in ſacris ordinibus conſtitutus, viz. in ordine ſubdiaconatûs, ideo conſideratum eſt per curiam, quòd deliberetur ſecundùm formam ſtatuti in hujuſmodi caſu edit. & proviſ. ſine cauterizatione* And the like, if he plead the king's pardon of burning in the hand.

And if a layman pray his clergy, and it appear of record, that he had it before, then the entry is, *Et quia per inſpectionem recordi coram domino rege hic miſſi &c. quòd aliter idem* J. S. *indictatus exiſtit &c.* ſetting out the effect of the record, *& quòd ipſe eſt eadem perſona, & hoc idem* J. S. *non dedicit, ideò conſideratum eſt, quòd privilegium clericale eidem* J. S. *non allocetur, & quòd ſuſpendatur per collum quouſque &c.*

And ſo if he prays his clergy, [and cannot read,] *Et tradito ei per curiam libro idem* J. S. *non legit ut clericus, ideò conſiderat' eſt, quòd ſuſpendatur per collum, quouſque mortuus fuerit.*

III. The judgment in high treaſon againſt the king for conſpiring his death, or levying war, or for a prieſt upon the ſtatute of 27 *Eliz. cap.* 2. or for any new treaſon made by authority of parliament is in this manner.

Firſt the king's ſerjeant or attorney *juxta debitam legis formam petit verſus ipſum* E. D. *ſuper veredict' prædict' judicium & executionem pro dicto domino rege habend.' &c.* but this is not of abſolute neceſſity, for the court *ex officio* ought to give judgment.

Et ſuper hoc viſis & per curiam hìc pleniùs intellectis omnibus & ſingulis præmiſſis conſiderat' eſt, quòd prædictus E. D. [397] *ducatur per vicecomitem com'* Middleſex, or *per mareſcallum hujus curiæ*, or *per conſtabular' turris* London *uſque mareſcalciam &c.* or *uſque turrim* London, or *uſque gaolam domini regis com' prædicti* (according as the priſoner is in cuſtody,) *Et de inde per medium civitatis* London *directè uſque ad furcas de* Tiburne *trahatur, & ſuper furcas illas ibidem ſuſpendatur, & vivus ad terram proſternatur, & interiora ſua extra ventrem ſuam capiantur (c) ipſoque vivente (d) comburantur, & caput ejus amputetur, & corpus ejus in quatuor partes dividatur, & caput & quateria illa ponantur ubi dominus rex ea aſſignare voluerit.*

(c) *Secreta membra amputentur* is here ſometimes inſerted, *Show. caſes in parliament p.* 187. but it is not of neceſſity, *vide* the ſentence in lord *Derwentwater's* caſe, *Stat. Tr. Vol.* VI. *p.* 16.

(d) Theſe words *ipſoque vivente*, or others tantamount are abſolutely neceſſary, otherwiſe the judgment is erroneous. See 2 *Salk.* 632. *Show. caſes in parliament p.* 127. *Rex verſus Walcot.*

But

But if the priſoner be in the king's bench and the judgment be given in that court, the entry is *quòd prædictus* J. S. *ducatur per prædictum mareſcallum uſque priſonam mareſcalciæ domini regis coram ipſo rege, & de inde ad quendam locum executionis, vocat.* St. Thomas Watringes, *trahatur, & ſupra furcas ibidem ſuſpendatur*, and ſo forward as in the judgment.

Thus the judgment was enterd againſt *Barkly* a ſeminary prieſt upon an indictment in *Middleſex*, *P.* 38 *Eliz.* upon the ſtatute of 27 *Eliz.* But the judgment againſt a woman in all caſes of high treaſon is to be drawn and burnt. *Co. P. C.* 211.

Upon an indictment of treaſon for counterfeiting the king's coin the judgment is only, as in petit treaſon, *viz. quòd ducatur uſque gaolam domini regis de* Newgate *per vic' com'* Middleſex, *& ab inde uſque ad furcas de* Tiburn *trahatur & ibidem ſuſpendatur, quouſque mortuus fuerit.*

And the judgment againſt a woman is alſo, as in petit treaſon, to be burnt. 25 *E.* 3. 42. *(e)*.

This is agreed of all hands, but as to clipping or impairing of coin [there hath been ſome doubt,] and likewiſe as to counterfeiting of foreign coin made current by proclamation, becauſe theſe are new created treaſons. *Co. P. C. p.* 17.

[398] But yet in caſes of clipping or waſhing made treaſon by the ſtatute of 5 *Eliz. cap.* 11. & 18 *Eliz. cap.* 1. the judgment is now ſettled to be only drawn and hanged, as in caſe of counterfeiting of the coin of the kingdom by 25 *E.* 3. *de proditionibus*, and this was agreed, and accordingly judgment given againſt two *Frenchman*, *Hill*, 25 *Car.* 2. *(f)*, according to the book of *T.* 6 *Eliz. Dy* 230. *b.*

And with this agrees the reſolution of 24 *H.* 8. in juſtice *Spilman's* reports cited 2 *Co. Inſt. p.* 636. A prieſt drawn and hanged for clipping the king's coin, and yet clipping was not held to be treaſon within the ſtatute of 25 *E.* 3. but made ſo [by the ſtatute of 3 *H.* 5. *cap.* 6. according to the common opinion and the recital of the ſtatute of 5 *Eliz.*] *(g)*, and ſo repeald by the ſtatute of 1 *Mar. cap.* 1. yet even while that ſtatute of 3 *H.* 5. was in force, the judgment was only drawing and hanging in that caſe.

(e) N. Edit. 85. *b.*

(f) Bellew & Norman, 1 *Vea.* 254.

(g) In the original MS. the words in this place are, *By the ſtatutes of* 5 & 18 Eliz. *according to the common opinion and the recital of thoſe two ſtatutes*: but it appears by what follows, that the ſtatute of 3 *H.* 5. was intended here to be mentiond, nor is it recited in the ſtatute of 18 *Eliz.* but only in that of 5 *Eliz.*

And

And upon ſearch of precedents both in the king's bench and at the *Old Baily*, tho ſome precedents were of hanging drawing and quartering for clipping, yet the moſt uſual were only drawing and hanging *(h)*.

And upon the ſame reaſon I think, that in caſe of counterfeiting of foreign coin made current by proclamation, made treaſon by the ſtatute 1 *Mar. cap.* 6. and the clipping or waſhing thereof, likewiſe made treaſon by 5 and 18 *Eliz.* I think there ought to be no other judgment but drawing and hanging, for by the proclamation and the act of 1 *Mar.* it is now become as the coin of this realm, and it were an incongruous thing for a man to be hanged and quartered for counterfeiting foreign coin made current by proclamation by interpretation of the ſtatute of 1 *Mar.* and yet to be only drawn and hanged for counterfeiting the proper coin of the kingdom.

For counterfeiting the great or privy ſeal certainly there was anciently no other judgment but that of petit treaſon, namely drawing and hanging, as appears by the book of 2 *H.* 4. [399] 25. *a. (i)*, and the record of that caſe, tho my lord *Coke* excepts againſt it in *P. C. p.* 15. *ſed de his vide quæ ſupra dixi Part* I. *cap.* 16. *p.* 187.

IV. The judgment in petit treaſon is for a man to be drawn and hanged, for a woman to be drawn and burnt, as alſo in high treaſon, *Co. P. C. p.* 211. for the other judgment is unſeemly for that ſex. *Stamf. P. C. Lib.* III. *cap.* 19. *fol.* 182. *b.*

V. The judgment in all caſes of felony is, *quòd ſuſpendatur per collum, quouſque mortuus fuerit.*

But if a man be outlawd of treaſon or felony, tho there be no other judgment, but *utlegatus eſt per judicium coronatorum*, yet it is of itſelf an attainder and ſubjects the offender to an award thereupon to be made by the court, where he is brought, as is ſuitable to the offenſe, for which he is indicted and outlawd.

And this judgment is as well to be given againſt a nobleman as another in caſe of felony, and cannot be given otherwiſe by the court, or executed otherwiſe by the ſheriff. *Co. P. C. p.* 211 & 52. *(k)*.

VI. The judgment of *peine fort & dure* at this day in caſe of felony is only where the priſoner ſtands mute of malice upon his arraign-

(*b*) *Vide Part* I. *p.* 352.
(*i*) *Clement Peytenin's* caſe, *vide Part* I. *p.* 181. *in notis*, & *p.* 352.
(*k*) *Vide Part* I. *p.* 501.

ment

ment or will not directly anſwer, for upon challenging above twenty his challenge ſhall be only over-ruled *(l)*, and the trial proceed.

But at common law in all caſes of felony and at this day in petit treaſon, if he challenge thirty-ſix peremptorily, he ſhould have his judgment of penance *(m)*, and this holds as well in an appeal as in an indictment, and as well in caſe of women as men. 2 *Co. Inſt.* 177. *ſuper ſtat. Weſtm.* 1. *cap.* 12.

The entry of the judgment is thus:

Et quæſitum eſt per curiam ab eo qualiter ſe velit inde acquietare, qui dicit, quòd ipſe non vult ſe ſuper aliquam juratam patriæ ponere, niſi ſalummodo in Deum; tunc inſuper dictum eſt ei per curiam hìc, quòd niſi [400] *aliter in hâc parte reſpondeat mori debet, qui dicit, quòd non vult aliter reſpondere in hâc parte niſi ut prius, ideò conſideratˇ eſt, quód idem* R. B. *ducatur ad priſonam mareſcalciæ domini regis coràm ipſo rege, & ibidem nudus præter baccas ſuas ponatur ad terram ſuper dorſum ſuum directè jacens, & foramen in terrâ ſub ejus capite fiat & caput ejus in eodem ponatur, & ſuper corpus ſuum ubi libet ponatur tantum de petris & ferro, quantum portare poteſt & plus; quamdiu vivit, & quòd habeat de pane & aquâ peſſimis & priſonæ ei proximis, & illâ die quâ comedit non bibat, neque illâ die quâ bibit non comedat, ſic vivendo quouſque mortuus fuerit (n).*

And if he ſtands wholly mute, then the entry is thus:

Et allocutus quommodo ſe velit de feloniâ prædictâ acquietare, qui quidem R. *nihil reſpondet, ſed ſe mutum tenet, & ſuper hoc captâ inquiſitione per ſacramentum* 12 *&c. ſi prædictus* R. *loqui poſſit, vel ſi prædictus* R. *prædicto die &c. loquutus fuerit necne, qui dicunt ſuper ſacramentum ſuum, quòd prædictus* R. *loquutus fuit iſto eodem die & bené loqui poteſt ſi velit, ideò idem* R. *ut ipſe qui legem recuſat, hoc eat ad pœnam &c.* ut ſupra. *Catalia ipſius nulla.*

And ſometimes alſo the jury were charged to inquire *ſi malè credatur*, but that was but rarely in caſe of an indictment *(o)*, for the indictment itſelf carries a probability, that he may be guilty when joined with his own wilful refuſing his trial, ſo that he forfeits his goods by ſuch ſtanding mute.

VII. Judgment in petit larciny is only to be whipt, or impriſoned by way of chaſtiſement *(p)*.

(*l*) *Supra p.* 270, 314.
(*m*) *Supra p.* 268, 316.
(*n*) *Vide ſupra cap.* 43. *p.* 319. *Raſt. Entr. fol.* 385. *pl.* 2.
(*o*) *Vide* the caſe of *Thomas de la Hethe ſupra p.* 322. *in notis.*
(*p*) But by ſubſequent ſtatutes the offender may be tranſported. See 4 *Geo.* 1. *cap.* 11. and 6 *Geo.* 1. *cap.* 23. *vide ſupra p.* 388. *in notis.*

VIII. Judg-

VIII. Judgment in miſpriſion of treaſon is forfeiture of all his goods, forfeiture of the profits of his land during his life, and impriſonment during his life *(q)*.

IX. Judgment in theftbote is fine and impriſonment.

4 Blackſ. Com. ch. 29. per tot. 2 Hawk. P. C. ch. 48.

(q) Part I. *p.* 374.

CHAP. LVI. [401]

Concerning giving of judgment, by whom, *and* when.

WHAT courts have juriſdictions in cauſes criminal and capital have been handled before in the beginning of this Part; I am now to conſider when one judge may give judgment upon a conviction before another judge, and how.

The king's bench is the center of all ſubordinate juriſdictions, eſpecially in matters capital.

If *A.* be indicted of felony before juſtices of peace, *oyer* and *terminer*, or gaol-delivery, and be convict by verdict or confeſſion, if the record of the conviction be removed into the king's bench by *certiorari*, and the priſoner alſo be removed thither by *habeas corpus*, that court may give judgment upon that conviction, but there muſt be firſt a filing of the record in the king's bench, and a commitment of the priſoner to the cuſtody of the marſhal, and he muſt be called to ſay what he can, why judgment ſhould not be given againſt him, and thereupon judgment may be given: *vide* 23 *H.* 8. *cap.* 1 & 11. 10 *H.* 4. 9. *a. Coron.* 467.

And indeed there was no other remedy before the ſtatutes of 11 *H.* 6. *cap* 6. & 1 *E.* 6. *cap.* 7. for judgment to be given upon perſons reprieved before judgment, for the former commiſſions are determined by new ones at common law.

But if the conviction were not before the judge of the king's bench, ſo that the offender continued not always in cuſtody of the marſhal or of thoſe that are his bail, but be removed by *habeas corpus* or brought in by proceſs, the party ſo removed may plead he is not the ſame perſon and give ſome diverſity of name, and if the king's attorney

confeſs it, he ſhall be diſcharged and proceſs made out againſt the other perſon, thus it was done in the caſe of *John Apare*, *Lib. placitor' Coron. n.* 7. who was taken upon a *capias utlegat'* and pleaded he was not the ſame perſon.

Or the king's attorney may take iſſue upon it and aver him to be the ſame perſon, and known by one name or the other. 21 *E.* 4. *Surry. Lib. placitor' Coron. placito* 31. *Nicholas Browne*'s caſe.

Or if he anſwers nothing but ſtands mute, it ſhall be inquired whether he be the ſame perſon by inqueſt, before judgment be given againſt him, for he ſhall not be concluded by the return of the ſheriff either upon a *cepi corpus* or *habeas corpus*, if he was not always in cuſtody of the ſame court from the time of his firſt arraignment, *vide accords* 10 *E.* 4. 19. *b.* but if he had been always in cuſtody of the court of king's bench from the time of his arraignment, or had been bailed by the court, and came in and rendered himſelf upon his bail, then no ſuch inquiry ſhall be made upon his ſtanding mute. 10 *E.* 4. 19. *b.*

And that I may ſay it once for all, the ſame law is where a party is outlawd or abjured, and comes by *capias utlegat'* or other proceſs into the king's bench, he ſhall be demanded what he can ſay why execution ſhould not be awarded againſt him upon the record removed, which 7 *H.* 6. 25. *a. B. Coron.* 44. is called an arraignment; if he confeſs himſelf to be the ſame perſon, execution ſhall be awarded; if he deny himſelf to be the ſame perſon and the king's attorney confeſs it, he ſhall be diſcharged; if the king's attorney take iſſue upon it, it ſhall be tried; if the priſoner ſay nothing, it ſhall be inquired by an inqueſt of office whether he be the ſame perſon: *vide* 8 *H.* 4. 3 & 18. *B. Coron.* 22, 23. 10 *E.* 4. 19. *b. M.* 5 *Car. Croke, p.* 176. *Coxe*'s caſe.

If an iſſue be joined in the court of king's bench in an appeal of felony, or in an indictment of treaſon or felony either upon a record originally begun in that court, or removed thither by *certiorari*, the uſual courſe now is to try it at the bar, or if it were removed by *certiorari* out of another county, to remit the record according to the ſtatute of 6 *H.* 3. *cap.* 6. to the juſtices, before whom ſuch [403] indictment was originally taken, with a writ to command them to proceed therein, whether the record was ſo remitted before or after iſſue joined in the king's bench.

But

But many times that court antiently did, and at this day may ſend down the tranſcript to be tried by *niſi prius*, as well in an indictment as an appeal, and upon the return thereof the court may give judgment of death or acquittal, according to the verdict returned: *quod vide ſæpius L.*

But whether they might inquire of abettors there hath been diverſity of opinions, *vide* 2 & 3 *P. & M. Dy.* 120, 121, 131. *b.* but by the better opinion they cannot, 10 *E.* 4. 14. *b.* 4 *Co. Inſt.* 160. nor can they arraign the felon at the ſuit of the king, if the plaintiff be nonſuit in his appeal 22 *E.* 4. 19. *a.* (*).

It hath been held by ſome, that juſtices of aſſiſe and *niſi prius* may by virtue of the ſtatute of 27 *E.* 1. *de finibus cap.* 3. without any other commiſſion deliver the gaol and give judgment of felons, *vide Stamf. P. C. Lib.* II. *cap.* 45. *fol.* 57. *b.* but yet that hath not been uſed, neither is it ſafe to be practiſed without a commiſſion of gaol-delivery: *vide ſtat.* 3 *H.* 5. *ſtat.* 2. *cap.* 7.

But certainly at common law juſtices of *niſi prius* could not give judgment upon an appeal or indictment ſent to them out of the king's bench by *niſi prius* to be tried, no more than in other ordinary civil cauſes, for they have but the tranſcript of the record before them, and their commiſſion is only *ad triandum exitum*, and to remit the tranſcript with the verdict indorſed upon the *poſtea* (†).

But by the ſtatute of 14 *H.* 6. *cap.* 1. juſtices of *niſi prius* have power in all caſes of felony and treaſon to give judgment of acquittal or attainder at the day and place where their inquiſitions, inqueſts, and juries are taken, and then and there to award execution to be made by force of the ſame judgments.

But yet it ſeems this ſtatute gave them not power to inquire of abetters in an appeal, nor to arraign the priſoner upon a nonſuit before them at the king's ſuit, 10 *E.* 4. 14. *b.* 22 [404] *E.* 4. 19. *a.* but this was to be done in the king's bench upon the return of the *poſtea*.

But upon this ſtatute theſe things are to be obſerved.

1. That they might return the *poſtea* into the king's bench, and there, judgment may be given as at common law, for tho the ſtatute gives them power to give judgment and award execution, yet it leaves them power to return the *poſtea*, and takes not away the power of the

(*) *Vide ſupra p.* 41. (†) *Vide ſupra p.* 40.

king's bench to give judgment and award execution upon the *poſtea* returned, as they might have done at common law.

2. That as the priſoner cannot be arraigned nor plead to iſſue in the king's bench, unleſs the record and alſo the priſoner be there, ſo the record itſelf ſtill remains in the king's bench, and only the tranſcript delivered to the judges of *niſi prius* and not the record itſelf, as upon the ſtatute of 6 *H.* 8. yet upon that tranſcript the judges of *niſi prius* may give judgment and award execution by virtue of the ſtatute of 14 *H.* 6. *cap.* 1.

But then the priſoner muſt either be ſent down by *habeas corpus* to the ſheriff of the county, where the *niſi prius* is, in cuſtody, or elſe bailed to appear there, for no inqueſt can be taken by default, or in the abſence of the priſoner in caſes capital.

And if the priſoner be bailed by the king's bench to appear at the *niſi prius*, (as he may,) yet if he appear not, the inqueſt cannot be taken, but only the priſoner called upon his bail, and the default recorded, and ſo upon the return of the *poſtea* new proceſs againſt the priſoner, and alſo againſt his bail.

At common law by granting a new commiſſion of the peace all proceedings before former commiſſioners of the peace were diſcontinued, and if an iſſue were joined, or a perſon convicted, or had judgment, the new commiſſioners could not proceed to trial, judgment, or execution, but all that could be done was to remove the record by *certiorari* and the priſoner by *habeas corpus* into the king's bench, and there to proceed where the juſtices left off.

[405] And to remedy this the ſtatute of 11 *H.* 6. *cap.* 6. was made, whereby it is enacted, "That ſuch proceedings ſhall "not be diſcontinued by ſuch new commiſſion, but the new juſtices "after they have the records before them ſhall have power to con- "tinue the ſame pleas and proceſſes, and the ſame pleas and pro- "ceſſes and all that depend upon them to hear and finally determine, "as the other juſtices might have done, if no new commiſſion had "iſſued.

By virtue of this ſtatute new commiſſioners might not only give judgment upon conviction before former juſtices of peace, but might award execution upon judgments given by the former juſtices, as ſhall be farther ſhewn.

But this ſtatute extended not to commiſſions of *oyer* and *terminer* and gaol-delivery, but only to commiſſions of the peace.

And

And therefore the ſtatute of 1 *E.* 6. *cap.* 7. was made, which among other things enacts, "That where any perſon ſhall be found guilty of "treaſon or any felony, for which judgment of death ſhould be given, "and be reprieved before judgment, new commiſſioners of gaol-deli-"very may give judgment upon ſuch conviction, as the juſtices of "gaol-delivery, before whom he was convicted, might have done.

"And that no manner of proceſs or ſuit made, ſued, or had before "any juſtices of aſſiſe, gaol-delivery, *oyer* and *terminer*, of the peace, "or other the king's commiſſioners ſhall in any wiſe be diſcontinued "by the making and publiſhing any new commiſſion or aſſociation, "or by altering the names of ſuch juſtices or commiſſioners, but that "the new juſtices of aſſiſe, gaol-delivery, and other commiſſioners "may proceed in *every behalf*, as if the old commiſſion and juſtices "and commiſſioners had ſtill remained and continued not altered.

Tho this ſtatute in the firſt part thereof mentions giving of *judgment* upon a perſon convict, yet I take it very clear they may award *execution* upon a party reprieved after judgment by former commiſſioners, for by the ſecond clauſe they may proceed in *every behalf* as the former commiſſioners might have done, and therefore there is little cauſe for the *quære* made touching that point in *Dyer (g)*, [406] yet I have generally obſerved this one rule, that I would never give judgment, or award execution upon a perſon reprieved by any other judge but myſelf, becauſe I could not know upon what ground or reaſon he reprieved him *(h)*

See the references at the end of the ch. next ſupra.

(g) Dyer fol. 165. *a.*

(h) The uſefulneſs of this caution may be ſeen from what is obſerved by Sir *John Howles* in his remarks on *Cornish*'s trial, *State Tr. Vol.* IV. *p.* 203, where he relates the caſe of ſome perſons, "Who had been "convicted of the murder of a perſon "abſent barely by inferences from fooliſh "words and actions; but the judge before "whom it was tried was ſo unſatisfied in "the matter, becauſe the body of the "perſon ſuppoſed to be murdered was "not to be found, that he reprieved the "perſons condemned; yet in a circuit "afterwards a certain unwary judge, with-"out inquiring into the reaſons of the "reprieve, ordered execution and the "perſons to be hanged in chains, which "was done accordingly; and afterwards "to his reproach the perſon ſuppoſed to "be murdered appeared alive.

CHAP. LVII.

Concerning executions.

MUCH of what concerns this matter hath fallen in under the former chapter, and therefore I ſhall be brief in it. I ſhall conſider.

1. Who may award execution.
2. In what manner it is to be awarded.
3. By what warrant to be made.
4. By whom it is to be done.
5. In what manner.
6. Concerning reprieves or reſpite of judgment or execution.

I. As to the firſt of theſe it hath been diſpatched in the former chapter, they that may give judgment may award execution.

And therefore the court of king's bench upon on *habeas corpus* and a *certiorari* to remove the body of a priſoner and the record of his out-
[407] lawry or attainder before them may award execution upon him. *M.* 5 *Car. B. R. Croke p.* 176. *Coxe*'s caſe, *vide quæ dicta ſunt ſupra cap.* 56.

II. Touching the manner of it there be certain caſes, wherein tho the priſoner be attainted, yet he is not to have execution awarded againſt him, till he be demanded what he can ſay why execution ſhould not be awarded againſt him, *viz.*

1 Where a woman is convicted and attaint by judgment, tho ſhe remains always in cuſtody, ſo that *conſtat de perſonâ*, yet execution is not to be awarded againſt her till ſhe be demanded what ſhe can ſay why execution ſhould not be awarded, for ſhe may allege pregnancy, which, tho it be no cauſe to reſpite judgment, is a good cauſe to reſpite execution.

2. Where the judgment was given at a former ſeſſion, for in that interval between this and the former ſeſſion he may have a pardon to plead.

3 Where the priſoner hath not always remained in the cuſtody of the court, where he firſt had judgment, for in that caſe, if he be brought in by a *capias* by the ſheriff, he ſhall not be concluded, but

that

that he may ſay he is another perſon, and iſſue may be taken upon it, and that iſſue ſhall be tried before he ſhall have execution awarded againſt him, and if he ſtands mute, it ſhall be inquired whether it be of malice. 10 *E.* 4. 19. *b.* Again,

4. If judgment were given in another court, or by other juſtices, as in caſe where a record of an attainder comes from another court by *certiorari* into the king's bench, or if a man be outlawed for felony, and the outlawry either removed or returned into the king's bench, and the felon brought in by *habeas corpus* or *capias utlegat'* he ſhall be demanded what he can ſay why execution ſhould not be awarded againſt him, which 7 *H.* 6. 25. *a.* is called an arraignment, for in theſe caſes, 1. He ſhall not be concluded by the return of the ſheriff from ſaying he is not the ſame perſon that was outlawed, and upon that, iſſue may be joined, and it ſhall be entered of record and tried (*), unleſs the king's attorney confeſſeth it: *vide ſupra cap.* 56. 2. He may have the king's pardon to plead. 3. In caſe of an outlawry he may aſſign error in the outlawry, and pray reſpite to purchaſe a writ of error, and the court uſually in ſuch a caſe prefixeth him a day, and gives him reſpite to purchaſe a writ of error, and in the mean time remits him to the marſhal and reſpites his execution. [408]

Thus it was done in the caſe of *David Dene*, *H.* 16. *E.* 4. *Placit. cor. n.* 57. who was taken by a *capias utlegat'* returnable in the king's bench, *Et ſtatim quæſitum eſt ab eo, ſi quid pro ſe habeat vel dicere ſciat, quare ad executionem de eo ſuper utlegariâ prædictâ procedi non debet.*

He alleged, that at the time of the outlawry pronounced he was in priſon in the tower of *London*, *Et ſtatim quæſitum eſt ab eo per cur' ſi habeat aliquid breve de errore necnè, qui dicit quòd non; ideò injunctum eſt eidem* David *ex gratiâ per curiam, quòd ipſe breve de errore in hâc parte habeat coràm domino rege in octabis* Hillarii, and upon his failure a ſecond and a third peremptory day was aſſigned him, at which day he ſhewed to the court a writ of error and aſſigned the ſame error in fact, and iſſue was taken upon it, and a *venire facias* returnable in *Mich.* term, the priſoner ſtill remaining in cuſtody, and execution reſpited till the iſſue tried.

But it is to be noted, that he that will delay his execution by alleging error in the outlawry and praying liberty to purchaſe a writ of error, muſt allege error in fact, or error in law upon the outlawry to obtain

(*) *Kel.* 13. The caſe *Barkſtead, Okey* and *Corbet.*

that reſpite of execution before his writ of error be brought, for if the court be ſatisfied, that it is merely a pretenſe, they may chuſe, whether they will allow him a day to ſue forth a writ of error, but may award execution preſently. 1 *H.* 7. 13. *b. John Collin*'s caſe, *vide Co. P. C. p.* 212.

If either the priſoner himſelf, or any as *amicus curiæ*, inform the court of any error in the outlawry, the court *ex officio* muſt prefix him a day to purchaſe his writ of error, and in the mean time reſpite execution, but if he purchaſe not his in convenient time, execution ſhall be awarded.

III. By what warrant the execution is to be made.

[409] In the king's bench there is no other writ nor warrant but an award of the court upon the judgment, *viz. Et dictum eſt mareſcallo, quòd faciat executionem periculo incumbente*, for in the king's bench the marſhal is the immediate officer of the court to make execution in theſe caſes, for that court never gives judgment againſt any, that is not *in cuſtodiâ mareſcalli* in caſes capital, and ſo are all the antient and modern precedents, *vide* 3 *H.* 7. 7. *a. M.* 5 *Car. B. R. Cro. p.* 176. *Coxe*'s caſe, and ſo was directed by the court upon view of the precedents themſelves mentiond in my lord *Coke*'s book of *Entries*, *Tit. Indictment per totum*, *P.* 25 *Car. B. R.* in *Brown*'s caſe *(a)*.

When an attainder of felony or treaſon is againſt a nobleman, the judgment is pronounced by the lord high ſteward, and the warrant for execution is under his precept and ſeal in his own name. *Co. P. C. p.* 31.

When judgment is given by commiſſioners of *oyer* and *terminer*, regularly the precept for execution ſhould iſſue to the ſheriff in the names and under the hands and ſeals of three of the commiſſioners, whereof one to be of the *quorum*, before whom judgment was given, *Co. P. C. p.* 31. but by uſage (as far as I can learn of late times,) it is now done only by leaving a calendar with the ſheriff declaring their judgments (*).

When a man hath judgment of death before juſtices of gaol-delivery, the regular way is, either to iſſue a precept to the ſheriff, in the names of the commiſſioners, reciting the judgment, and commanding execution to be done, or otherwiſe by an award upon the record, *Et dictum eſt per curiam hic vicecomiti comitatûs prædicti, quòd faciat executionem periculo incumbente.*

(*a*) 3 *Keb.* 193. 1 *Vent.* 243. (*) *Supra p.* 81.

But

But of latter time there is no more done, but after judgment entered the judge ſubſcribes a calendar in paper, directing the ſeveral judgments of deliverance of the parties acquitted, or the execution of the parties condemned.

Only *Rolle* would never ſubſcribe any ſuch calendar (*), but would command the ſheriff openly in court to take notice [410] of the judgments and orders of what kind ſoever, and command the ſheriff to execute them at his peril.

The reaſon of the difference between juſtices of gaol-delivery and of *oyer* and *terminer* is this; all the precepts, that iſſue at a ſeſſions of *oyer* and *terminer*, as for a *venire facias tales*, &c. ought in true order of law to be by precept in the names and under the ſeals of the juſtices, but the precepts by juſtices of gaol-delivery need not be otherwiſe than by a ſimple award upon the roll: *Ideò præceptum eſt vicecomiti, quòd venire faciat hìc &c.*

IV. By what officer execution is to be made.

Regularly the officer, that is to make the execution, is that officer in whoſe cuſtody by law the priſoner is at the time of the judgment given, for into his cuſtody he is to be remanded after judgment pronounced, and there to ſtay till judgment executed.

Therefore, where judgment is given at the ſeſſions of gaol-delivery, the execution is to be made by the ſheriff, or his under-ſheriff or deputy, for regularly he is in his cuſtody ordinarily, but if the priſoner be in the *Tower* of *London*, (which is oftentimes the caſe of perſons indicted for great treaſons,) and he be arraigned before juſtices of *oyer* and *terminer*, he is commonly brought before them by a precept to the conſtable of the *Tower*, (which is an exempt priſon from that of the ſheriff,) and if he be convict and attaint, he is commonly remitted thither, and the precept or warrant for execution muſt go to the lieutenant or conſtable of the *Tower*, for it is purſuant to the judgment, *viz. quòd prædictus* E. *ducatur per præfatum locumtenent' turris* London *uſque ad dictum turrim, & deinde per medium civitatis* Lond. *directè trahatur uſque furcas de* Diburn &c. And thus it was done in the caſes of the traitors at the powder-treaſon 3 *Jac.* But uſually a command or precept is made to the ſheriffs of *London* and *Middleſex* to be aſſiſting to the lieutenant.

If the priſoner be arraigned in the king's bench either for [411] treaſon or felony, he is or ought to be always firſt committed

(*) *Vide Part* I. *p.* 501.

to

to the marſhal, and by him is to be brought to the bar upon his trial and judgment, and to him he is to be remitted after judgment till execution, and whereſoever the felony or treaſon was committed, yet the marſhal is to make execution, for he is in this caſe the immediate officer to the court, and the priſoner is not in the cuſtody of any ſheriff, but of the marſhal.

And therefore the entry in this caſe of felony is, *Et dictum eſt mareſcallo, Quòd faciat executionem periculo incumbente.* c

But in caſe of high treaſon the marſhal is mentioned in the very judgment, *viz. quòd ducatur per præfatum mareſeallum uſque priſonam mareſcalli mareſcalliæ domini regis, & deinde uſque ad furcas ſancti* Thomas Watrings *trahatur & ibidem ſuſpendatur &c.* thus is the entry of the judgment, *P.* 44 *Eliz.* againſt *Patrick Dalph B. R. T.* 43 *Eliz. B. R.* againſt *John Tipping, T.* 39 *Eliz. B. R.* againſt *John Jones.*

And in the caſe of *Brown P.* 25 *Car.* 2. that had judgment in the king's bench for felony upon the ſtatute of 3 *H.* 7. for an offenſe committed in *Middleſex*, and there preſented and convicted, the execution was made by the marſhal in the uſual place of execution in the county of *Surrey (b).*

Only in theſe and the like caſes the court gives order to the ſheriff of the county, where the execution is made, to be aſſiſting to the marſhal.

V. As to the manner of the execution, as it is to be done by the proper officer; ſo it is to be done purſuant to the judgment.

The judgment in caſe of felony is, *ſuſpendatur per collum, quouſque fuerit mortuus.*

The ſheriff may not alter the execution, if he doth, it is felony, and ſome ſay murder. *Co. P. C. p.* 211, 217. *(c).*

[412] If the party be hanged and cut down and revive again, yet he muſt be hanged again, for the judgment is to be hanged by the neck *till he be dead (d).*

The judgment in high treaſon is complicated, *viz.* hanging, beheading imbowelling, *&c.*

The king may pardon all but the beheading, for this is part of the judgment, the judgment is not altered, but part of it remitted. *Co. P. C. p.* 52.

But this muſt be under the great ſeal. *Co. P. C. p.* 31.

2 Hawk. P. C. ch. 51. 4. Black. Com. ch. 32.

(b) The like was done in *Altboe*'s caſe *T.* 9 *Geo.* I. *B. R. vide ſupra in notis Part* I. *p.* 464.

(c) Vide Part I. *cap.* 42. *p.* 501. *in notis.*

(d) Vide Choron. 335.

CHAP.

CHAP. LVIII.

Concerning reprieves *before or after judgment.*

REPRIEVES, or ſtays of judgment or execution are of three kinds, *viz.*

I. *Ex mandato regis*, thus we find it done in 3 *H.* 7. 7. *a.* tho *ore tenus*, or by ſome meſſage, or by ſending his ring, but at this day it is ordinarily ſignified by the privy ſignet, or by the maſter of requeſts.

II. *Ex arbitrio judicis.* Sometimes the judge reprieves before judgment, as where he is not ſatisfied with the verdict, or the evidence is uncertain, or the indictment inſufficient, or doubtful whether within clergy; and ſometimes after judgment, if it be a ſmall felony, tho out of clergy, or in order to a pardon or tranſportation. *Crompt. Juſt.* 22. *b.* and theſe arbitrary reprieves may be granted or taken off by the juſtices of gaol-delivery, altho their ſeſſions be adjourned or finiſhed, and this by reaſon of common uſage. *Dy.* 205. *a.*

III. *Ex neceſſitate legis*, which is in caſe of pregnancy *(e)*, [413] where a woman is convict of felony or treaſon. *Co. P. C.* 17. *Stamf. P. C. Lib.* III. *cap. ult.*

1. *Enſeinture* is no ground to ſtay judgment, and therefore if a woman convict be aſked what ſhe can ſay why judgment ſhould not be given, *enſeinture* is no cauſe of ſtay; but when judgment is given, ſhe ought again to be demanded why execution ſhould not be made, and there ſhe may allege *enſeinture in retardationem executionis.* 22 *Aſſiz.* 17. *Coron.* 180.

2. *Enſeinture* is no cauſe to ſtay execution, unleſs ſhe be *enſeint* with a *quick* child, or which is all of one intendment, if ſhe be *quick* with child. 22 *Aſſiz.* 71. *Coron.* 180.

3. When this is objected in delay of execution, it ought to be inquired of by a jury of twelve diſcreet women, and their verdict is to be recorded, and according as they give it the execution is to proceed or ſtay. *Ibid.*

4. This privilege is to be allowd but once, for if ſhe be a ſecond time with child, ſhe ſhall not thereby delay execution, but the gaoler

(e) Thus it was by the civil law. *Dig. Lib.* XLVIII. *tit.* 19. *de pœnis l.* 3. and alſo by the laws of *William* the conqueror *l.* 35. *vide Bract. de Coron. cap.* 32. §. 11. *Fleta Lib.* 1. *cap.* 38. §. 15. *vide Part* 1. *p.* 368.

ſhall

ſhall be puniſhed for not looking better to her. 12 *Aſſiz.* 11. *Coron.* 168. 23 *Aſſiz.* 2. *Coron.* 188.

If ſhe be *priviment enſeint* and not *quick* with *child*, and only ſo found by the jury of women, that is no cauſe of reſpite; but I have rarely found but the compaſſion of their ſex is gentle to them in their verdict, if there be any colour to ſupport a ſparing verdict.

6. This reprieve is or ought to be a matter of record, and therefore I have always taken it, that altho ſhe be delivered before the next ſeſſions, yet the ſheriff ought not to make execution after her delivery, neither ought the judge to give ſuch direction upon the reprieve granted, but at the next ſeſſion the woman muſt again be called to ſhew what ſhe can ſay why execution ſhould not now be made, and ſhe is to be heard 12 *Aſſiz.* 11. *Coron.* 168. *ameſne al barre*, for it may be the *tempus præſtitutum* for her delivery ſince the laſt ſeſſions is not yet paſt, and ſhe muſt ſtay till then, or it may be ſhe hath ſince had the king's pardon, which the ſheriff cannot allow nor judge of.

[414]

And therefore the books tell us, that after her delivery ſhe was brought to the bar again to ſhew what ſhe could ſay why execution ſhould not be made; this bringing to the bar muſt needs be at a ſecond or following ſeſſions. 12 *Aſſiz.* 11. *Coron.* 168. 22 *E.* 3. *Coron.* 258.

The End of the Second Volume.

A

TABLE

OF

THE PRINCIPAL MATTERS

CONTAINED IN THE

TWO PARTS OF THIS TREATISE.

N. B. In the following Table, where there are no numerical letters, the pages referred to are in the firſt Part, and ſo are the pages which precede theſe letters, *ii*; but the pages, the numbers of which come after theſe letters in the Table, are in the ſecond Part.

In the firſt *Part* (through miſtake) after page 146 follows a repetition of the pages 143*, 144*; 145*, 146*, which are diſtinguiſhed by aſteriſms both in the book at large, and in the Table; ſo in the ſecond *Part* after page 156 enſues an iteration of page 149*, and of the ſucceſſive numbers to 157 excluſive, which iteration or repitition is alſo pointed out by aſteriſms, as well in the Table, as in the book.

Abatement.

APPEALS, for what cauſes abated. ii. *Page* 149, 150
Priſoner miſnamed, or having a falſe addition pleads to indictment, or anſwers to it on his arraignment, is eſtopped from taking advantage of *miſnomer* or falſity of addition. ii. 175, 176
Miſnomer in civil action, not error. ii. 175
Where priſoner will take advantage of *miſnomer*, how ſpecial entry to be. ii. 175, 237
Miſnaming firname in appeal, cauſe of abatement; *contra* of indictment, *tamen quære.* ii. 175, 176
Miſnomer of chriſtian name in appeal or other action at ſuit of party, good plea ii. 237, 238
Whether *miſnomer* of chriſtian name in indictment be a good plea. ii. *Page* 176, 238
Safeſt to allow plea of *miſnomer* both as to chriſtian and firname, and if grand-jury not diſcharged, indictment may be amended by them, and returned according to true name ſet forth in plea. ii. 176, 237, 238
Expoſition on 1 *H.* 5. of additions. ii. 176, 177
If party indicted have no addition or a falſe one, he may except to former, and plead to latter. ii. 176
Outlawry on ſuch indictment, erroneous. ib.
What good additions of degrees or myſteries, or not. ii. 17 , 177

Addition

Addition to be to ſubſtantive name, not only to *alias dict.* ii. *Page* 177
It refers to laſt antecedent. ib.
Spinſter applicable to man or woman, but yeoman not. ib.
Single woman a good addition. ib.
Indictment againſt peer good without addition. ib.
Several indicted for one offence, *miſnomer*, &c. of one quaſheth indictment only againſt him, and reſt put to anſwer, and ſo in treſpaſs. ib.
If in appeal or indictment *miſnomer* of ſirname is pleaded; replication, *que conus per une noſme & lautre*, good; but in appeal or action, if *miſnomer* pleaded of chriſtian name, plaintiff muſt take iſſue, and cannot reply in that manner. ii. 238
In all caſes of *miſnomer* priſoner to plead over to felony. ib.
Plea of *miſnomer* or falſe addition tried by ſame inqueſt, that paſſes on priſoner, and not in foreign county. ii. 238
Of pleas in abatement by matter of record ii. 239
One indicted of ſame murder on two indictments, is arraigned on indictment laſt taken; ſecond ſhall not abate, but uſually former quaſhed by judgment. ib.
How peer indicted by a common name may plead *miſnomer*; title part of his name; but on plea pleaded muſt ſhew forth writ teſtifying it; plea triable by record. ii. 240

Abettors. Vide Murder, Principal and Acceſſary, Statutes in general, Treaſon, &c.

Abjuration.

Taken away. 605. ii. 68
Vide Religion.

Acceſſary. Vide Principal and Acceſſary.

Acquittal. Vide Judgment, Pleas, Verdict.

Addition. Vide Abatement.

Adjournment. Vide Commiſſion, Court.

Admiralty.

What ſhall be ſaid ſea or ſalt water. *Page* 424
Admiral at common law had conuſance of capital crimes committed on the ſea. 500
In capitals he had three ſorts of, juriſdictions. ii. 12
Of the primitive juriſdiction of the admiralty. ib.
They proceed by maritime laws; trial by proofs. ib.
A capital ſentence wrought no corruption of blood. ib.
Might hold their ſeſſion any where on land. ii. 12, 18
In creeks, &c. *infra corpus com.* they had juriſdiction at common law. ii. 15
General commiſſions of *oyer* and *terminer infra com.* extended not to miſdemeanors on ſea-coaſts, ſave in creeks, &c. *infra corpus com.* ii. 16, 17
Expoſition on 15 *R.* 2. giving admiral juriſdiction in any river or creek within body of county. ii. ib.
It extends only to death of a man and maihem. ib.
B. R. and general commiſſioners of *oyer* and *terminer* have a concurrent juriſdiction. ii. ib. 18
Coroner of county, as well as of admiralty may inquire of ſuch deaths happening in great rivers, *viz.* arms of the ſea flowing and reflowing beneath firſt bridges. ib.
What rivers this *act* extends to. ii. 16
Extends to deaths happening in great ſhips, not ſmall veſſels. ib.
This juriſdiction being annexed to the admiralty, they may proceed by marine law, tho before 28 *H.* 8. they proceed by commiſſion

ſion under great ſeal, and by inquiſition ii. *Page* 16
Expoſition on 28 *H.* 8. of proceedin treaſons and felonies done on the ſea. ii. 16, 17
One ſtricken on ſea dies on ſhore after the reflux, admiral by this *act* hath no juriſdiction. ii. 17, 20
Of the commiſſion directed by this act. ii. 17
Proceedings thereon by the courſe of the common law. ib.
Acceſſary diſpuniſhable by this *act*, but how otherwiſe puniſhable. ii. 17, 18
In all crimes within it, clergy allowed, ſave in treaſon, piracy, and murder. ii. 17
A mute ſhall have *peine fort & dure*. ib.
Whether attainder thereon works corruption of blood, and how indictment to be for that purpoſe. 355. ii. 18
If formerly a moral ſtroke had been given on the ſea, and party had died within body of county, neither admiral nor common law had juriſdiction. 426. ii. 19 to 21, 162
A robbery at ſea, goods brought to land *infra corpus com.* not triable at common law. ii. 18
Treaſon or felony at ſea, not triable at common law, but on this *act*. ib.
To commiſſions on this *act* is generally added a commiſſion of peace, *oyer* and *terminer*, and *gaol-delivery*. ii. 18, 19, 20
Therefore Seſſion ought to be *infra com.* ii. 19

Vide Piracy.

Affray.

Second blow makes the affray. 456

Vide Arrests.

Aiding and Aſſiſting. Vide Indictment. Murder, Principal and Acceſſary, Statutes in general, &c.

Alien.

Where aliens guilty of treaſon, where not. *Page* 59, 60, 92 to 96
How *merchant alien enemy* ſhall be uſed. 60, 93, 94
If aliens renounce *king's* protection, not to be dealt with as ſubjects. 60, 93, 94
Sometimes *alien enemies* conſtraind to give ſecurity, *quod ſe bene gerant erga regem*, &c. at other times to ſwear fealty to the *king*. 60, 93
Their Debts and goods confiſcate. 95
What a good plea in bar to debt brought by alien enemy *primâ facie*; what a good replication to avoid it. ib.
How *king* may authorize alien enemies to ſue for their debts *here*. ib.
A ſubject of an hoſtile prince is preſumed to adhere to him; he ſhall be ranſomed, and his goods *here* confiſcate. 164, 165
Where ſtatute ſpeaking of ſubjects extends to aliens here. 541, 542
How alien indicted and tried.

Vide Challenge, Jury and Trial.
Vide Alligeance, Ambaſſadors, Treaſon.

Alligeance.

Divided and ſubdivided. 62
Oaths of alligeance by common law and ſtatute. ib.
Antient oath how comprehenſive; where and by whom to be taken. 63, 64, 65
Alligeance, or *fidelitas regia*, due only to a ſovereign. 64, 65
Double kind of lige fealty, as where one prince is ſubordinate to another, and yet hath *ſumma imperia* over his ſubjects. 65
Exemplified from hiſtory. 65 to 68, 72, 73
Inſtance of *rex pater & rex filius*, (ſupreme alligeance being reſerved to the father,) and of a *king* ſubordinate to both. 65, 66, 67

Oaths

Oath applicable to *king*'s perſon, as well as crown. *Page* 67
Salvâ fide & ligeantiâ domini regis, in all oaths of fealty, as well as profeſſion of homage to a ſubordinate lord; omiſſion puniſhable. 67, 68.
Ought not to be two co-ordinate, abſolute alligeances to ſeveral independent princes. 68
Divers before loſs of *Normandy*, *ad fidem regis Angliæ & Franciæ*; how they ordered their homages and fealties. 68, 69
Difficulties thence ariſing. ib.
Homage, its diviſion, and in what *homagium ligeum* differs from alligeance, and by whom to be performed, and when. 71, 72
Wherein that agrees with and differs from *homagium feudale*. 72
Of mixt homages, partly lige, partly not. 72, 73
Inſtance of mixt homage, when a ſovereign prince hath a vaſſalage or poſſeſſion in another prince's dominions. 73, 74, 75

Ambaſſador.

If a ſubject born, tho he never took oath of alligeance, become a ſworn ſubject to a foreign prince, and is ſent hither as his miniſter, and conſpire againſt *king*'s life, treaſon. 96
Whether a foreigner being agent of a foreign prince, either in amity or enmity, come over with or without *king*'s ſafe conduct, and here conſpire againſt *king*'s life, or to raiſe rebellion or war, ought to be treated as traitor or enemy. 96
Whether puniſhable as an enemy for inconſummate attempts. 97, 98, 99
The prince to whom ſent the proper judge. 98
For rape, *&c.* indictable in ordinary courſe. 99
Whether *comites legati* have ſame privilege as ambaſſador. 100

Amendment.

Clerk of aſſiſe forgets to enter adjournment of commiſſion of *gaol-delivery*; record not amendable. *Page* 494
8 *H.* 6. gives liberal power to juſtices to amend records. 649
Where caption of indictment returned is faulty in form, it is ſame term amendable by clerk of aſſiſe or peace, but not in another term. ii. 168
In another term clerk, that returns it, ſhall be fined for his informal return. ib.

Amercements.

A man drowned in a pit, coroner may charge vill to ſtop it, and if not done before next gaol-delivery, vill amerced. 424
Vill amerced for burying body before coroner ſent for. ib.
One ſlain in the day in a town walled or not, town amerced; if inſufficient, hundred; and in default, county; ſo upon an eſcape. 448, 603. ii. 73
So if out of any vill, hundred, and in their default, county amerced. 448. ii. 73
Murdrum, what ſort of amercement; how far taken away by ſtat. 425, 447, 448.
Not impoſed in caſes of death *per infortunium*. ii. 73
Latrocinium, what, 425
A man killed either in day or night, and offender committed to conſtable or vill, upon eſcape vill, where party ſlain, or offender taken, fineable. 448
Felon in bringing to gaol eſcapes, is killed in purſuit, yet town amerced. 489, 490, 602
A man ſlain within precinct of the vill before day-light gone, offender eſcapes, vill amerced; otherwiſe, if ſlain in the night, except town be walled, and then in either caſe it ſhall be amerced;

ced; becauſe gates ought to be ſhut from ſun-ſet till ſun-riſing. *Page* 448, 604. ii. 73
Amercements on country for eſcapes of felons, by whom to be ſet. 600, 603
Vill amerced, if felon eſcape from private perſon without default. 601
If felon in carrying to execution eſcape, vill not amerced. 602
If vill commit a felon to four men to convey to gaol, who ſuffer an eſcape, vill amerced. 605
If a ſtranger prevents arreſt, whereby felon eſcapes, vill amerced. 606
Negligent eſcape preſentable in a *leet*, but they cannot ſet a common fine or amercement there. 603
Amercement called *eſcapium* takes place in caſes of death *per infortunium*. ii. 73
Felon taken by townſhip, and delivered to ſheriff, &c. eſcapes, townſhip not chargeable, but ſheriff, &c. ib.
But if in guard of conſtable, who is bringing him to gaol, he eſcapes; tho gaoler refuſed to take him, vill chargeable; nay, tho he be ſlain, becauſe he reſiſted. ib.
Vill amerceable only in caſe of death of a man; but in other felonies, as theft, tho thief not taken, no amercement or other penalty at common law, but by ſtat. of *Winton*. ii. 73, 74
But if they had a felon in their cuſtody, or in cuſtody of a conſtable, and he eſcapes, vill had been amerceable, and ſo of the hundred. ii. 74
In caſe of manſlaughter, where the *decenna* was antiently amerceable, where vill. ib.
If any of the family of clergymen, noblemen, or knights antiently committed a murder, &c. and fled, his maſter was amerceable. ib.
How one preſent that takes not offender, is puniſhable. ii. *Page* 75, 76
Where three amercements for one eſcape. ii. 75
Townſhip amerced for eſcape, tho felon never actually taken. ii. 93

Apoſtacy. Vide Religion.

Appeals.

In treaſon long diſuſed; appeals of treaſon in parliament wholly taken away by ſtat. 349. ii. 150
Year and day for bringing appeal of murder, how computed. 427
Whether jury may find guilty of manſlaughter one appealed of murder. 449, 450
In appeals, juſtices of *niſi prius* may inquire of abettors, and give judgement, and if plaintiff nonſuit, arraign priſoner at *king's* ſuit. ii. 41, *149
May allow clergy to a convict of manſlaughter on appeal. ii. 41, *149
If appellant die or releaſe, tho appellee be indicted alſo, yet on nonſuit of plaintiff, proceeding for *king* ſhall not be on indictment, but appeal. ii. *149
What cauſes of abatement of appeal. ii. 149, 150
Where party ſtricken in one county dies in another, appeal in either. ii. 163
In appeal of death by writ, perſon killed is certain, but an appeal of robbery writ general, and it appears not what goods are till declaration. ii. 221
Autrefoits convict and clergy had a good bar to indictment or appeal for ſame crime. ii. 251
And ſo, if clergy prayed, and court will adviſe upon it, tho clergy not actually allowed. ib.
For pleas to appeal. Vide Plea.
If appellee ſtand mute, judgment of *peine fort & dure* ſhall be given. ii. 317

Vide Mute.

For reſtitution in appeals of robbery. Vide Reſtitution.
For appeal of rape. Vide Rape.
For power of coroners in taking appeals. Vide Coroners.
For proceſs in appeal. Vide Proceſs.
Where clergy ouſted in appeal, or not. Vide Clergy.
For appeal by approver. Vide Approver.
For arraignment on appeal. Vide Arraignment.

Approver.

Coroner has power to take his accuſation. ii. *Page* 67, 227
Approvement deſcribed. ii. 67
In diſcretion of court to admit him to approve or not. ii. 226
Admitting approver long diſuſed. ib.
Of what offenſes approvement may be. ii. 227
In what ſuits. ii. 228
When one ſhall become approver. ii. 228, 229
Before whom he may become ſuch. ii. 229
Of the manner of approvement and allowance of it. ib.
What duty of court on party's confeſſing felony and praying a coroner. ii. 229, 230
What proceſs on appeal by approver. ii. 230, 231
Of proceedings on appeal after appearance of appellee. ii. 232, 233

Arraignment.

Definition and various etymologies of the word. 344. ii. 216 to 219
A reſcuer of a traitor, or one ſuffering a wilful eſcape, or receiver of a traitor, ſhall not be arraigned till principal convict. 237, 238, 5 1, 598. ii. 224
None to be attaint of treaſon without arraignment, except outlawed, &c. 344, 347 to 350
If indictment of murder charge one as principal in firſt degree, another as preſent and aſſiſting, if principal in firſt degree neither appear nor be outlawed, principal in ſecond degree arraigned. *Page* 437. ii. 223
Felons arraigned on the *mainouvre* at *king's* ſuit. 156, 348
But ſuch arraignment wholly ouſted by ſtatutes. ii. 149*
Appeal brought at party's ſuit, and plaintiff nonſuit on that appeal, offender arraigned at *king's* ſuit thereon, and ſo if appellant die or releaſe, and tho he be indicted as well as appealed, yet on nonſuit of plaintiff, proceeding for the *king* ſhall be on appeal only. ii. 149*, 221
But it muſt be where plaintiff hath declared on appeal by writ, or hath formed his appeal by bill. ii. 149*
Where defendant ſhall be arraigned on appeal, where not. ii. 149*, 150*, 221
Where appeal bad, defendant may be arraigned on indictment, if any, before the court. ii. 150*
If none, court may bind him over to another ſeſſions, and in mean time to be of good behaviour. ib.
In civil action *de uxore raptâ cum bonis viri*, if defendant was convicted, it antiently ſerved for indictment. ib.
So in ſpecial verdict in treſpaſs for taking goods in *B. R.* if it was found that defendant took them feloniouſly, antiently this ſerved for indictment. ii. 150*, 151*
And ſo if on a juſtification in ſlander for calling a man thief, verdict be for defendant, and this be in *B. R.* and for felony in ſame county where court ſits, or if before juſtices of aſſize, having alſo a commiſſion of gaol-delivery, plaintiff ſhall be forthwith arraigned on this verdict. ii. 151*

But return of reſcue of felon, or breach of priſon, not ſufficient to arraign party upon. ib.
In treaſon or felony offender muſt appear in perſon. ii. 216
Of what parts arraignment of a priſoner conſiſts. ii. 218, 219
If priſoner hath any matter to plead, either in abatement or bar, then he pleads without immediate anſwering to the felony; but in ſome caſes *ſi trove ne ſoit*, then to the felony, *not guilty*. ii. 219
Priſoner to be brought to bar without irons, unleſs danger of eſcape. ib.
But uſually brought to bar *in vinculis* for fear of eſcape; but ſtands at bar unbound, till judgment. ib.
In murder antiently court forebore to arraign priſoner on indictment, till year and day paſt, whether pending appeal, or not. ii. 220, 249
But now by ſtatute juſtices ſhall try him on indictment of murder, *&c.* tho within year, and if acquitted, he ſhall not be diſcharged; but at diſcretion of juſtices continued in cuſtody; or on bail, till year and day paſt. ii. 220, 249, 250
Where an inquiſition before coroner is returned, and there is alſo an indictment for ſame offenſe, on which beſt to arraign priſoner; and where there ought to be a *ceſſet proceſſus* on coroner's inqueſt. ii. 221, 222
In caſe of appeal and indictment for ſame offence, where there ought to be a *ceſſet proceſſus* on indictment. ii. 221
If indictment be of manſlaughter, and coroner's inqueſt of murder, beſt to arraign of higheſt offence, and ſpare the other. ii. 222
If both of murder, but one inſufficient, then to arraign on good one. ii. 222, 239
If both good, and returned into court ſame ſeſſions, beſt to arraign priſoner on both, (ſo as they be put on ſame inqueſt to be tried), and to indorſe acquittal or attainder on both preſentments; jury to be directed to acquit him on both, if acquitted on one, and *e converſo*. ii. 222, 239
Felon may be arraigned of breach of priſon before convict of firſt felony; *contra* of eſcape or reſcue. ii. 224
Yet if *A.* be acquitted of principal felony, he may plead that acquittal in bar to indictment for breach of priſon. 611, 612. ii. 224
Where one brought in on *exigent* ſhall be arraigned *de novo*, ii. 224, 225
If any exception taken by way of abatement, counſel ſhall be aſſigned. ii. 236
Priſoner ſhould not formerly in any caſe have had a copy, but only *oyer* of indictment ib.
If exceptions to indictment appear material, court can quaſh it, and direct new bill to be ſent to grand jury, wherein the faults may be amended, and priſoner arraigned *de novo*. ii. 237
One indicted on two indictments; one for murder, other on 1 *Jac.* of ſtabbing; he ſhall be arraigned on both. 468. ii. 239, 240
If on ſpecial verdict finding a felony, court erroneouſly adjudge it none, and that judgment be reverſt, whether party ſhall be executed or arraigned *de novo*. ii. 247
Juſtices would rarely arraign priſoner on indictment, eſpecially for murder, within year after *death*, in favour of appeal, unleſs appellant an infant, or evidence very pregnant. ii. 249
A. attaint of felony by outlawry; outlawry reverſed, he ſhall be put to anſwer ſame felony. ii. 251
One by coroner's inqueſt found to have killed a thief aſſaulting to

rob, &c. ſhall not be arraigned on that indictment, but diſmiſſed without any judgment. ii. 395
Juſtices of *aſſiſe* cannot arraign at K.'s ſuit on nonſuit before them on appeal, but this done in *B. R.* on return of *poſtea*. ii. *Page* 404
How a madman ſhould be treated on his arraignment. Vide Ideot.
For arraignment of acceſſary. Vide Principal and Acceſſary.

Arreſt.

Who purſues not a felon is fineable. 448, 449, 484, 593 ii. 75, 76
On *cap. ad ſatisfaciendum*, doors cannot be broke open; but on an *habere facias poſſeſſionem*, they may. 458
Officer entering by outward door open, may break open inward doors. ib.
If warrant not ſtrictly lawful, yet if matter within juſtice's juriſdiction, and warrant under his ſeal, officer not to diſpute validity. 460
Juſtices warrant where void, and officer ſubject to falſe impriſonment. 577
Where matters being within juſtice's juriſdiction, officer excuſed. ib.
Warrant not expreſſing certainty of crime, irregular, and officer cannot break open doors. 577, 584
One taken on ſuch, how to be diſcharged. 578
If reſcued or wilfully let go, ſuch eſcape or reſcue not felony. ib.
Such warrant erroneous, not void; it excuſeth in falſe impriſonment, real crime being felony, or crime within juſtices cognizance. ib.
General warrant to take all ſuſpected void; falſe impriſonment lies for one taken thereon; *contra* of rule in *B. R.* of ſame import. 580, 586, 587. ii. 105, 112
Juſtices may iſſue warrant for treaſon, examine and commit. 580
Where juſtice of foreign county may iſſue his warrant againſt a felon, and commit. *Page* 580
Warrant iſſued by juſtice of proper county to take a felon, he before arreſt flies into foreign county, and is purſued and taken, he muſt be carried before juſtice of foreign county; but if taken in proper county, he eſcape into the foreign, he may be brought before juſtice of either. 581. ii. 94. 115
Conſtable hath ſame protection on purſuit and arreſt in foreign county, as proper, whether he hath a warrant or not. ii. 94
Warrant, to whom directed. 581. ii. 110.
May be directed to a private man, but he not compellible to execute it. 581. ii. 110
Officer refuſing or neglecting may be indicted. 581
Conſtable cannot ſubſtitute. ib.
Conſtable not bound to execute warrant out of his diſtrict, yet *factum valet*. 582. ii. 110
Before whom warrant returnable; difference, where returnable generally, and where before juſtice who made it; not in election of party to go before whom he pleaſes. 582. ii. 112
On warrant for ſurety of peace, or good behaviour, or againſt one that hath dangerouſly wounded another, buſineſs declared, and priſoner demanded, doors may be broke open. 459, 582. ii. 94, 95, 117
If officer hath once laid hands on priſoner, he may break open outward doors to take him. 459
If warrant directed to five bailiffs two or three may execute it. ib.
Sheriff or bailiff, on *cap. utlegatum*, *cap. pro fine*, or other proceſs for *king*, may break open doors, if not opened on demand. 459
Where officer muſt ſhew his warrant, or not. 458, 462, 583. ii. 92, 116

A pri-

A private man muſt ſhew his warrant, or ſignify contents. *Page* 459

What ſufficient notice of a man's being a conſtable, *&c.* 460 to 464

Juſtice of peace may grant a warrant on probable ſuſpicion, and doors may be broke open by him to whom directed. 579, 580, 583

For what end conſtable, or any other, during affray, may break open doors, unleſs one dangerouſly wounded or killed. 589. ii. 95

Of what offenſes conſtable having received information, or any private man, without a warrant may arreſt, and break open doors on refuſal to open them, or deliver up party. 589

Where law makes a private man an officer, and he may arreſt a felon, and in order thereto break open doors. 588. ii. 76, 77, 92, 202, 203

Where conſtable *ex officio* may break open doors to take felon. ii. 90, 92, 202, 203

Where conſtable on *hue and cry* may break open doors, or not. ii. 102, 103

What previous to breaking open doors. ii. 103

Difference between private man's and conſtable's arreſting on ſuſpicion. ii. 92

On *excommunicato capiendo* doors cannot be broke open. ii. 116

If juſtices iſſue a warrant to take a felon, who is in juſtice's houſe, officer after demand, *&c.* may break open the door; and ſo for ſuſpicion of felony. ii. 116, 117

Where ſheriff on civil proceſs may break open the houſe of another than the party againſt whom proceſs is. ii. 117

Judge of *B. R.* may *ore tenus* command a tipſtaff to arreſt, without expreſſing the cauſe ii. 586

Officer or private man breaking open a houſe to take a felon, a treſpaſſer to the owner, if felon not there. ii. 117

Juſtices of *oyer* and *terminer* may iſſue a commiſſion to take one indicted before them, whereby doors may be broke open, but commiſſion muſt be ſhewn if demanded. ii. *Page* 106

Conſtable, on his watch may break open doors to keep the peace, or in caſe of diſorderly drinking, or noiſe in a houſe at unſeaſonable hours ii. 94, 95

Conſtable *ex officio* may arreſt one, that has broke the peace in his view, and keep him in his houſe or ſtocks. 587

Where one is dangerouſly hurt, conſtable may impriſon on common fame, or report of another. ib.

Whether on an affray out of view, he can arreſt without warrant. ib.

Where private man may arreſt without warrant, whether felony done in ſame county, or not. 587, 588. ii. 76

A. dangerouſly wounds *B. C.* being preſent may impriſon *A.* till brought before juſtice, or delivered to conſtable. 558. ii. 77

Felony committed, a private man may arreſt on probable cauſe of ſuſpicion. 558, 595. ii. 78, 81

What are probable cauſes. 588. ii. 81

How and in what time private man to diſmiſs himſelf of offender. 589. ii. 77, 81

Moſt uſual and ſafe to bring him before a juſtice, or if that cannot be done in time, to call conſtable to one's aſſiſtance. 590. ii. 76, 77

Whether private man can raiſe power to take or detain a felon. 601. ii. 76

Prevention of arreſts, a miſdemeanor, not felony. 606

Of perſons that may arreſt. ii. 72

What required to maintain a juſtification of impriſonment, on

ſuſpicion, and how officers and private men are to juſtify in ſuch caſes. ii. *Page* 78, 79, 80, 91
No felony, no ground of ſuſpicion. ii. 78
No felony done, party arreſted may be inlarged, and eſcape diſpuniſhable. ii. 78, 79
But in caſe of a felony, tho party arreſted innocent, who lets him go not being duly delivered, is puniſhable. ii. 79
Regularly, party ſuſpecting muſt arreſt. ib.
What party ſuſpecting is to do to oblige conſtable to aſſiſt. ib.
Juſtice to be acquainted by him with whole caſe. ib.
Juſtification in aid of conſtable on felony done, and a ſuſpicion, is good. ii. 79, 80
Suſpicion may be by any; impriſonment muſt be by conſtable. ii. 80
If goods of *A.* be ſtolen, and found in *B.*'s cuſtody, and *A.* makes the caſe appear to the conſtable, and requires him to bring *B.* before a juſtice, this is a good juſtification in *A. ſans averment*, that he ſuſpected him. ib.
A felony committed, *A.* has probable cauſe to ſuſpect *B.* and acquaints *C.* with the whole matter, *C.* hereupon having probable cauſe to ſuſpect *B.* may juſtify by his own ſuſpicion; and ſo may one coming in aid of *A.* to arreſt *B.* ib.
One may alledge twenty cauſes of ſuſpicion, and it ſhall not make his plea double: what makes an iſſue upon the whole. ii. 81
If private man diſcharge party ſuſpected without bringing him to juſtice or conſtable, it is an eſcape, but makes not impriſonment illegal. ib.
He muſt not carry him to gaol of any other county than where taken, unleſs there be no gaol in that county. ii. 81
Arreſt on ſuſpicion permitted by law, not commanded. ii. 82, 84
Not ſame privilege in all points allowed to him, that arreſts on ſuſpicion, as to one arreſting on hue and cry, or by warrant, or his certain knowledge of the felony. ii. *Page* 78, 82, 84
If he, that arreſts on ſuſpicion, break open doors, it is at his peril; if party be a felon, it is juſtifiable, otherwiſe not; but he may enter by the doors open to arreſt. ii. 82
To prevent murder a private perſon may break open doors. ib.
But in all arreſts muſt acquaint party with cauſe thereof. ib.
Party not bound to take notice of a private man as authoriſed to arreſt, and may fly from him if innocent. ii. 83
But is bound to take notice, and ſubmit to a conſtable arreſting in *king*'s name, or offering ſo to do. ib.
Private man cannot beat innocent man arreſted on ſuſpicion, but only lay his hands gently on him. ib.
A bailiff cannot beat defendant before the arreſt, yet after arreſt and eſcape, a bailiff may juſtify beating him. ib.
Of officers of publick juſtice *virtute officii* impowered by law to arreſt felons and perſons ſuſpected of felony, and who they are. ii. 85, 86, *&c.*
How they are protected by law. ii. 85
Their actings not arbitrary, but neceſſary duties; they under ſevere puniſhments for neglect. ib.
Need no warrant to arreſt felons, and thoſe probably ſuſpected. ib.
All perſons bound to be aiding and aſſiſting to thoſe officers upon their ſummons in preſerving the peace, and apprehending malefactors, eſpecially felons. ii. 86
If any refuſe, how puniſhable. 581 ii. 86, 115

Aſſiſt-

Aſſiſtants under common protection of law with officers. ii. *Page* 85
By ſtatute may plead general iſſue, and have double coſts, as well as officers. ib.
Where a private man may arreſt a felon, theſe officers may do it. ib.
What power juſtices of peace have, *quoad* arreſt of felons. ib.
Juſtice ſeeing a felony, or other breach of peace done in his preſence, may arreſt felon. 587. ii. 86
So he may by word command any one to take him, which is a good warrant without writing. ib.
But if done in his abſence, then muſt iſſue his warrant in writing. ib.
If there be any riot or breach of peace like to happen by a tumultuous meeting, *&c.* he may command his ſervant or others, to prevent it by arreſting parties. ii. 86, 87
If he hath, either from himſelf or by a credible information, knowledge of a felony done, and juſt cauſe of ſuſpicion of any one, he may himſelf arreſt and commit that perſon. ii. 87
By ſtatute ſheriff injoined to arreſt felons, and all perſons required to aſſiſt on his ſummons. ib.
Taking felons belongs to ſheriff, as conſervator of peace. ib.
Sheriff may arreſt one ſuſpected of felony. ib.
Coroner conſervator of peace with regard to all felonies, and can command them to be apprehended, tho he can take no inquiſition but of death. ii. 88
Office of *conſtable*, miniſterial and original, or primitive, as conſervator of peace at common law. ii. 88, 90
Ought to execute precepts of juſtices, coroners, *&c.* or in default, fineable. ib.
By his original power may, for breach of peace and ſome miſdemeanors leſs than felony, impriſon. ii. *Page* 88, 90
If one expoſe an infant in the cold to deſtroy it, or charge pariſh, conſtable may take him and put him in the ſtocks. ib.
If aſſaulted, tho in his own caſe, may impriſon party and carry him to gaol. ib.
But for opprobrious words, or a general hindrance of him, to ſummon trained bands to attend mayor of *London* on his precept, held he could not juſtify impriſoning, but ought to have brought party to a juſtice. ib.
What may be done by conſtable, may be done by his deputy; for by law he may make a deputy, who within 7 *Jac.* may plead general iſſue. ib.
If one menace to kill another, on complaint conſtable may arreſt and put him into the ſtocks, till he can conveniently bring him to a juſtice, and to avoid preſent danger. ii. 88, 89
Conſtable cannot take ſurety of peace by recogniſance, but whether by bond, and that for affray or menace of breach of peace in his view. ii. 89, 90
If he be informed, that a man and woman are incontinent together, he may take neighbours and arreſt them, and commit them to find ſureties for good behaviour. ib.
Whether he may arreſt one ſuſpiciouſly reſorting with women of ill fame to a houſe ſuſpected of common bawdry, and what a good juſtification for him, or any in his aſſiſtance to plead. ib.
May arreſt ſuſpicious night-walkers and men that ride armed in fairs or markets, or elſewhere. ib.
May execute his office on information and requeſt of others, that ſuſpect and charge offenders but with ſuſpicion. ib.

Where felony done, he may *ex officio* arreſt and impriſon, till felon can conveniently be conveyed to a juſtice or common gaol. ii. *Page* 89, 90
All one, whether felony done in ſame vill, or in any other vill or county, if felon be within vill, where he is conſtable. ib.
Is by law injoined to take a felon, and, if he neglects his duty, indictable. ii. 91
Not material, whether he ſaw felony committed, or hath it by complaint and information; in both caſes bound to take felon. and ſearch for him within limits of his juriſdiction, and to raiſe hue and cry. ib.
If a felony done, *A.* ſuſpects *B.* on probable grounds, and acquaints conſtable, and requires his aid, conſtable may apprehend *B.* tho ſuſpicion ariſe in *A.* firſt. ib.
But *A.* ought to be preſent. ib.
He ought alſo to inquire and examine circumſtances and cauſes of ſuſpicion of *A.* which tho he cannot do on oath, yet ſuch information may make it conſtable's ſuſpicion. ii. 91, 92
A felony in fact muſt be done, and conſtable muſt aver it in his plea, and it is iſſuable. ii. 92
Conſtable, officer known within vill, preſumed of ſufficiency. ib.
Conſtable to do his duty, as well in caſe of probable ſuſpicion, as actual felony. ii. 93
On a ſudden affray he may put parties in ſtocks or priſon, till their paſſion or intemperance be over. ib.
If crime committed, for which conſtable may arreſt, whither he may convey priſoner. ii. 95
Safeſt to carry him before a juſtice. ib.
Till he can conveniently convey parties arreſted to a juſtice, or common gaol, he may detain them in ſtocks, if none in that vill, then in thoſe of next. ii. *Page* 95, 119
If he be of quality or ſick, how long, and where conſtable may, and ought to keep him. ii. 96, 119, 120, 122
Charges of ſending malefactors to gaol by common law are to be born by vill, where apprehended; but by ſtatute by priſoner, if able; if not, how levied. ii. 96
Commiſſion iſſuing out of *Chancery* to take *J. S.* and his goods, before indicted, againſt law. ii. 106
Yet a good juſtification in officer. ib.
Sheriff at common law might iſſue a warrant, to take a felon before indictment. ii. 107
Coroners by their warrants may attach man-ſlayers after inquiſition finding them guilty. ib.
May alſo make out warrants againſt perſons preſent, and not guilty; againſt burglars and robbers. ib.
If warrant be barely for a miſdemeanor, officer cannot purſue party into another county; but in caſe of felony, affray, or dangerous wounding, officer may purſue him, and raiſe hue and cry upon him into any county. ii. 115
Juſtice's warrant ſufficient cauſe of ſuſpicion and purſuit. ib.
One having warrant to arreſt for felony, *&c.* cannot make a warrant to another as his deputy, or command another to execute it in his abſence. ib.
Warrant directed to a known officer, enough for him to ſay, *I arreſt*, &c. ii. 116
Safe for officer to acquaint party with what he arreſteth him for. ib.
A warrant of a juſtice may be executed in a franchiſe. ib.
If juſtice hath juriſdiction, tho he err in granting his warrant, officer

ficer in executing it excuſable. ii. *Page* 119
Yet in ſome caſes, as touching rates for the poor, tho he hath juriſdiction by 43 *Eliz.* officer is puniſhable for executing warrant, where none ought to iſſue, becauſe a circumſcribed juriſdiction. ii. 119
After arreſt officer forthwith to bring party to gaol, or to juſtice, according to warrant. ib
When he hath brought him to juſtice, yet in law he is in cuſtody, till either juſtice diſcharge or bail him, or till he be actually committed. ii. 120
For more touching warrants. Vide Juſtice of Peace.
Where killing peace-officer is murder or manſlaughter. Vide Murder and Manſlaughter.
Where killing a felon, that reſiſts or flies before or after arreſt, is juſtifiable or not. Vide Homicide.

Vide Commitment, Hue and Cry, Juſtification, and Peace Officer.

Arſon.

Defined. ii. 566
Felony at common law; irrepleviſable by ſtatute; antient judgment burning. ib
By 8 *H.* 6. letters of menace were treaſon. 567
Not ſaid in indictment *domum manſionalem*, but *domum*. ib
What ſhall be ſaid *domus*. 567, 568
Where felony, or not, to burn a barn or out-houſe. 567
In *Northumberland* felony by ſtatute to burn a ſtack of corn. 568
Burning houſe of another. felony; but if tenant for years burn his own with intent to burn another's, and none but his own is burnt, only a miſdemeanor; *contra*, if houſe of another burnt. 567, 568
Setting fire to a houſe without burning any part, no felony; *contra*, if part burnt, felony by common law. 568, 569
Muſt be a wilful and malicious burning, elſe only treſpaſs. *Page* 569
A. intending to burn *B.*'s houſe, burns *C.*'s; felony. ib
Where burning a houſe, out-houſe or barn, ſhall be ouſt of clergy, or not. 567 *to* 575
Acceſſaries *before* ouſted by 4 & 5 *P.* & *M.* 572 *to* 575
Whether attainder by outlawry formerly ouſted them of clergy. 573
Whether men in orders convict hereof ſhall have clergy. 574

Aſſault.

Where one enters on poſſeſſion of another, where juſtifiable, where not. 485, 486

Vide Homicide, Murder and Manſlaughter.

Aſſembly. Vide Riot.

Aſſent. Vide Principal and Acceſſary.

Aſſiſe. Vide Juſtice of Aſſiſe.

Aſſociation. Vide Commiſſion, Gaol-delivery, Oyer and Terminer.

Attainder.

None to be attaint without being arraigned. ii. 344 *to* 350
Clergy allowed to one attaint 521
Whether outlawry is an attainder 521. ii. 350, 352

Vide Forfeiture.

Autrefoits acquit, attaint or convict. Vide Judgment, Pleas, Verdict.

Bail.

ONE bailed is *in cuſtodiâ*; *contra* of one let to mainprize. 325, 620

How

How the ſeveral entries are, and of other differences between bail and mainprize. ii. 35, 124, *Page* 125

Admitting bail, where it ought not, a negligent eſcape, but not voluntary, except by deſign. 596, 597

Bail antiently taken in no ſum certain, but *traditur in ballium* to *J. S.* which is the uſual form in all civil actions ii. 125

Of bail *corpus pro corpore*; now rarely uſed; why diſuſed; only fined, if he brought not in principal at the day ib

In civil actions this bail ſometimes in uſe ib

Uſually bail only a recogniſance in a ſum certain, for appearance of a felon; principal bound in double the ſum. *Vide* the form ib

What ſort and number of ſureties are required, but theſe things, as well as the ſum, diſcretionary in him who takes recognizance; therefore ſureties may be examined upon oath. ib.

What the words *ad ſtandum juri* import. ii. 126

Form of the true and regular bail, where party an infant, or in priſon, and ſo abſent; hereupon a warrant iſſues under hand and ſeal of the perſon who takes the bail, for his inlargement, called *liberate*. ib

Seal of juſtice not neceſſary; ſubſcription ſufficient. ib

If party bailed by juſtice before commitment, or if committed and brought into *B. R.* or ſeſſions to be bailed, then himſelf is alſo bound ib

Sometimes recognizance ſimple, with a condition added for his appearance, and ſometimes condition contained in body of recognizance. ib

When any is bailed for any miſdemeanor by *B. R.* either on return of *habeas corpus*, or otherwiſe, the return or record ought to be firſt filed, and a *committitur mareſcallo* entered, and then bail taken. *Page* ii. 126, 127

All bailed in *B. R.* are *de facto*, or ſuppoſed in law to be *in cuſtodiâ mareſcalli*. ii. 127

Such bail not only a recognizance in a ſum certain, but alſo real bail, and they are his keepers, and, if cauſe, are puniſhable by fine beyond the ſum mentioned, and may reſeiſe priſoner, if they fear his eſcape, or render him in their own diſcharge. ii. 126, 127

Regularly, in all offenſes againſt common law or ſtatutes, that are below felony, offender bailable, except after judgment, or bail be ouſted by ſtatute ii. 127

What ſtatutes relate to bailing offenders ii. 127

Who antiently were principally concerned in bailing them. ii. 127, 128, 136

Who bailable by common law, or not. ii. 128, 129

Expoſition on 3 *E.* 1. ii. 127 *to* 136

B. R. may bail in any caſe whatſoever, either in treaſon or murder, but this diſcretionary, not *de jure*. ii. 129, 148

Whereon bail may be taken by *B. R. viz.* on original indictment, *&c.* ii. 129

One found guilty of homicide *ſe defendendo*, juſtices of *gaol-delivery* may certify it into chancery, that he may ſue his pardon on courſe, and may bail him till next ſeſſions. ib.

They on inquiſition before coroner finding it *ſe defendendo* ſpecially, may bail party till next ſeſſions to procure ſuch pardon. ii. 130

They may in the interval of the ſeſſion bail a convict of manſlaughter having a pardon to plead, to another ſeſſions ib.

But if one be convict on trial againſt opinion of the judge, judge cannot bail him to ſue his pardon. ii. 130

While court adviſeth, whether convict within clergy, he is not bailable. ii. 130, 131, 132

One

One indicted of murder at a seſſions of *gaol-delivery* prays his trial, but proſecutor for *king* is not ready: on cauſe ſhewn, juſtice of *gaol-delivery* may bail. ii. *Page* 131
One arreſted by *king*'s perſonal command, not bailable on writ *de homine replegiando*, yet by *B. R.* on chancery on an *habeas corpus*. ib
Such a mandate under the great ſeal, void ib
Common writs *de homine replegiando*, or *de manucaptione* directed to ſheriff ii. 132
Some crimes not bailable for the heinouſneſs, other for the notoriety of them ib
Perſons outlawed not bailable by 3 *E.* 1. ib
If an outlaw of felony be taken on a *capias utlegatum*, and plead in avoidance of outlawry, or bring error to avoid it, *B. R.* may bail, whether outlawry on appeal or indictment ii. 132, 133
If one be indicted or appealed for a bailable offenſe, indictment or appeal hinders not his bailment; *vide* where not allowed till he had pleaded to the indictment ii. 133
If one be indicted before juſtices of a higher juriſdiction; as before juſtices of *oyer* and *terminer*, he cannot be bailed by juſtices of peace ib
Perſons having abjured for felony, not bailable ib
Taken in the *mainouvre* not bailable, but that is intended of thief himſelf ib
Felons breaking priſon, not bailable ib
Nor notorious thieves; herein common fame may be oppoſed againſt their bailing, unleſs they ſhew reaſonable evidence to prove their innocence ib
Nor perſons approved, except approver be dead, or hath waved his appeal, or perſon accuſed be of good fame ib
Nor perſons arreſted for *arſon* ii. *Page* 133, 134
Nor for falſifying king's coin ii. 134
Nor for counterfeiting *king*'s great or privy ſeal ib
Nor one excommunicate, unleſs for a temporal cauſe, and then on a prohibition granted, he may not only be bailed, but delivered, or on an appeal, and a ſpecial writ *de cautione admittendâ*, which if not obeyed by the ordinary, a ſpecial writ may iſſue for his enlargement ii. 134
Nor one impriſoned for ſome open miſdeed; as if *A.* dangerouſly wound *B.* he may be impriſoned till it be known, whether party will die or live, and regularly, not bailable till danger appear to be over ib
Nor priſoner for treaſon, that toucheth the *king*, whether indicted or not ib
But all theſe crimes are bailable by *B. R.* ib
Who bailable by ſheriff by 3 *E.* 1. ii. 134, 135
Perſons indicted before him of larceny, if of good fame ii. 134
Or impriſoned for a light ſuſpicion ib
Or indicted for petit larceny ib
Or accuſed of receiving felons ib
Or of commandment, force, or aid to felony done ib
Regularly in all felonies, even murder, acceſſary bailable, till principal attaint ii. 135
But principal once attaint, and then acceſſary taken, he ſhall not be bailable till he hath pleaded to indictment, but after plea pleaded he ſhall ib
One indicted for offenſe, wherefore he ought not to loſe life or member, bailable, ſave for offenſes againſt *acts* outting bail ib
One appealed by an approver ſince dead, bailable ib
If tenor of *mittimus* be to detain one without bail or mainpriſe; yet

yet if offenſe bailable, he may be bailed ii. *Page* 135
Penalties of 3 *E.* 1. for bailing one not bailable, and for detaining perſons repleviſable, after ſurety offered ib.
Juſtices of peace being inſtituted, bailing offender devolved on them ii. 136
Their power of bailment extended farther than ſheriff's, and in ſome kinds, than limits preſcribed by 3 *E.* 1. ib.
In ſome reſpects ſheriff's power, as to bailing in crimes not capital, inlarged by 23 *H.* 6. ii. 136, 137
By 34 *E.* 3. Juſtices of peace have power to take and commit malefactors, or bind them to good behaviour. ii. 136
1 *R* 3. gives to any one juſtice power to bail any priſoner for felony, and excepts not manſlaughter. ii. 137
Before this *act* doubtful, whether they could bail till indictment at their ſeſſions. ib.
3 *H.* 7. repeals 1 *R* 3. as to bailing by one juſtice, and gives it to two juſtices, whereof one of the *quorum*; it limits their power of bailment to caſes bailable by law, and takes in 3 *E.* 1. as the *directory*, who are bailable by law. ib.
1 & 2 *P.* & *M.* expreſly makes 3 *E.* 1. a direction for bailing offenders. ii. 128, 132, 137
By 1 & 2 *P.* & *M.* one arreſted for manſlaughter, or other felony bailable by law, or ſuſpicion thereof, ſhall not be bailed but by two juſtices, one of *quorum*, both to be preſent at bailing ſuch offender, and certify it at next *gaol-delivery*. ii. 138
But juſtices of peace and coroner in *London*, &c. to do as formerly. ib.
Juſtices of *gaol-delivery* may fine juſtices of peace offending againſt this *act*. ib.
2 & 3 *P.* & *M.* only provides for examinations, &c. to be taken by juſtices, as well on commitment, as bailing priſoner for manſlaughter, or other felony. ii. 138
The queſtion, whether juſtices of peace may bail in manſlaughter, conſidered. ii. 138, 139, 140
In murder *B. R.* only can bail. ii. 139
In manſlaughter, if there be plain proof, or a confeſſion, that one was killed, and that by *J. S.* whether done *ex malitiâ præcogitatâ*, or on a ſudden falling out, or but *ſe defendendo*; yet one or two juſtices (whereof one of the *quorum*), cannot bail by any law in force. ib.
Whether it doth *conſtare de perſonâ occidentis*, or *de modo occidendi*, or not, yet if party indicted of manſlaughter, or tho it were but *ſe defendendo*, juſtices of peace cannot bail. ib.
But if manſlaughter committed, and a party ſuſpect is brought before two juſtices of peace (whereof one of *quorum*), and there be any doubt of identity of the perſon, they may bail him by 1 *R.* 3. ib.
1 *R.* 3. the *baſis* of 3 *H.* 7. and this of 1 & 2 *P.* & *M.* ib.
3 *E.* 1. (*Weſtm.* 1.) tho it ſay *de morte hominis*, there is no bail at common law, it muſt be intended, when offender is certainly known; for it generally provides, that perſons taken on a light ſuſpicion ſhall be bailed. ib.
1 & 2 *P.* & *M.* ſuppoſing one taken for manſlaughter bailable, muſt mean ſuch a manſlaughter, where party is only ſuſpected, not where fact is done by him. ii. 139, 140
Where writ *de homine replegiando* lies, or not. ii. 141
Of the general writ *manucaptione*. ib.

Where

Where it lies. ii. *Page* 141, 142
Some taken by writ or proceſs may be bailed, *virtute officii*. ii. 143
Where ſpecial writs of mainpriſe lay ii. 143
Priſoners for felony antiently bailed to ſerve *king* in his wars ib.
B. R. may, *virtute officii*, bail any brought before them ii. 148
Sheriff might formerly, *ex officio*, at common law bail offenders indicted before him in his *Turn*, or on a commiſſion to him, but this power transferred to juſtices of peace ii. 148, 149
Marſhal of *B. R.* took on him antiently, *virtute officii*, to bail perſons indicted or appealed, but this power wholy ouſted by ſtatute ii. 149
At common law, without aid of 18 *Eliz.* priſoner acquitted might be bound to his good behaviour, if of ill fame ii. 394
In indictment or appeal tranſmitted to juſtice of *niſi prius*, if priſoner be bailed to appear in *B. R.* and appear not, priſoner to be called on his bail, and default recorded; and ſo on return of *poſtea*, new proceſs againſt priſoner and his bail ii. 404
Perſonating bail, felony *ſans* clergy by 1 *Jac.* but no corruption of blood, or loſs of dower 696
Bail taken, but not filed, not within it, [but ſince made felony]. ib.
Vide *Habeas Corpus*.

Bailiff. Vide Arreſt, Homicide. Murder.

Bailment. Vide Larciny.

Barretry.

Whether in indictment will need be alledged. ii. 180
Triable *de corpore comitatûs* ib.
A barretor is ſo every where ib.

Baſtard-child. Vide Evidence, Indictment.

Behaviour.

At common law, without aid of 18 *Eliz.* priſoner acquitted might be bound to his good behaviour, if of ill fame. ii. *Page* 394

Bigamy. Vide Poligamy.

Bona & catalla. Vide Indictment, Reſtitution.

Breach of Peace. Vide Arreſt, Riot, Juſtice of Peace.

Breach of Priſon.

Thereby cauſing eſcape of traitors, treaſon; but to make it ſo, they muſt be actual traitors; ſo of felons, felony. 141, 234 to 237, 326
Priſoner for treaſon, *&c.* breaking priſon may be indicted before convict of principal offenſe; *contra* of eſcape or reſcue 237, 238, 269, 611. ii. 224, 254
Breach of priſon by traitor only felony ii. 237
War levied to break priſon, with intent to deliver ſome particular perſons, unleſs impriſoned for treaſon, only a great riot; but if to break priſons generally, treaſon 134
Conſpiracy to enlarge a traitor, a miſdemeanor only 326
Reſcuing priſoners for a new treaſon, tho not expreſly mentioned in the *act*, is by neceſſary conſtruction treaſon 236
If commitment not in writing under ſeal, breach of priſon, ſave by a court of record, no felony 583, 584
Breach of priſon by priſoner for a miſdemeanor, felony by common law 607
Expoſition on ſtatute *de frangentibus priſonam* 608 to 612

What

What a priſon within this act. *Page* 608, 609
What being in priſon for ſuch a cauſe as requires *judicium vitæ vel membrorum* 609 to 611
Capital offenſes only intended by theſe words 609
A priſoner for petit larciny or homicide *ſe defendendo*, &c. breaks priſon, no felony ib.
But if commitment expreſs larciny above value, or manſlaughter, tho *de facto* otherwiſe, felony. ib.
If *mittimus* want a regular concluſion, ſufficient; but *ſans* cauſe expreſſed, whether felony ib.
When breach of priſon firſt became felony 610
Enough, if priſoner hath a notification of offenſe whereof arreſted, to make breach of priſon felony ib.
If offenſe, for which party committed appear not by matter of record, as indictment, neceſſary a felony be done, and ſo laid in indictment, and proved; elſe breach of priſon no felony; *contra*, if it appear by record. 599, 610
Breach of priſon within clergy, tho principal felony not 612
Breach of priſon by one committed for ſuſpicion of felony, if a felony done, is felony 610
One committed for a felony made by ſtatute *Puiſne* to 1 *E.* 2. breaks priſon, felony 611
Priſon fired without privity of priſoner, he may break it to preſerve himſelf ib.
If gaoler ſet open priſon doors, and a felon eſcape, no felony in priſoner ib.
If priſoner reſcued, or priſon broke by ſtrangers without his privity, no felony in priſoner, but in ſtrangers as a reſcue; but if by his procurement, felony in him, as a breach of priſon ib.
If felon acquitted of principal felony, he ſhall not be arraigned of breach of priſon, or if indicted for the latter before acquitted of the former, and then be acquitted of the former, he may plead it in bar to indictment for the latter. *Page* 611, 612. ii. 224, 254, 255
Breach of priſon carries a preſumption of guilt, and is a felony ſuper-added to the former. ii. 133

Vide Eſcape, Evidence, Indictment, Reſcue.

Bribery.

Thorp, C. J. adjudged to death for it 262, 263

Buggery.

Buggery with a man or beaſt, principal ouſted of clergy by 25 *H.* 8. revived by 5 *Eliz.* acceſſaries *before* and *after* within it. 669
Debet eſſe penetranio 628, 629
Emiſſio, evidence of penetration 628
Minima penetratio makes the crime *abſque emiſſione* ib.
Woman may be guilty with a beaſt within this act 669
If committed on one of age of diſcretion, both felons; otherwiſe only the agent 670
All preſent and aſſiſting, principals ib.

Burglary.

Watching at lane's end a preſence, and makes party a principal 439, 534, 555, 563
Hamſecken explained 547
In a vulgar acceptation how burglary underſtood 548
Diviſion and deſcription of legal burglary 549. ii. 360, 361
It muſt be in the night 549, 550
How indictment muſt be ib.
When it ſhall be ſaid night 550, 551

Both breaking and entering muſt be in the night, and a felony done or intended *Page* 551, 555, 559
But if hole broke one night, with intent to enter another, and they come the next night, and commit felony thro the hole, burglary 551
Antiently barely coming with intent to commit it, capital ib.
Diſtinction between breaking in law and fact 551, 552
A bare breaking in law not ſufficient to make a burglary ib.
What an actual breaking 552
Burglary by fraudulent pretences, and where it may be without actual breaking 552, 553
Whether going down a chimney to ſteal, be burglary 552
Servant in the night opens a door and lets in a thief to rob his maſter, burglary in both 553
A. enters by an open door, *&c.* and then unlatcheth a chamber-door to ſteal, burglary ib.
If a thief be lodged in an inn, and in the night ſteal goods, and go away; or if he enter ſecretly in the day, and ſtay till night, and then ſteal and go away, not burglary; *contra*, if he open an inner chamber-door and ſteal. ib.
Servant in the night draws the latch of a ſtair-foot-door, and enter's his maſter's chamber to murder him, burglary 554
Whether opening door to go out be burglary ib.
Whether, if door of the chamber of a lodger in an inn be latched, and a lodger in the night open his own door and ſteal goods in the houſe, be burglary ib.
But if he open chamber of another lodger to ſteal his goods, burglary ib.
It muſt in that caſe be ſuppoſed of the manſion-houſe of the innkeeper 554, 557
Entring *per oſtia aperta*, breaking a cheſt and ſtealing, not burglary, becauſe cheſt not part of houſe; *contra* of a ſtudy, counting-houſe or ſhop, tho not uſually lodged in the ſtudy, *&c. quære* of a cupboard or counter fixed to the houſe *Page* 554, 555
A. with intent to rob *B.* breaks a hole in his houſe, *B.* for fear throws out his money, *A.* takes it and carries it away, whether burglary 555
Where putting hand, hook or piſtol within window, burglary 553, 555
But whether ſhooting without, and bullet coming in be an entry, to make it burglary 555
A. ſends infant of ſeven years in at window, who ſteals and delivers goods to *A.* burglary in *A.* tho child who made the entry, be excuſed 555, 556
So in huſband, where wife in his preſence, and by his coercion commits burglary, tho ſhe ſhall be acquitted 556
How indictment ought to be for breaking and entring a church. ib.
May be committed of a houſe, tho all perſons out ib.
So, if one have two houſes, and live in them alternately ib.
A chamber in a college or inn of court, a manſion-houſe 522, 527, 528, 556
Muſt be laid *domum manſionalem*, and not *domum* 550
How indictment laid for breaking lodgings of a ſervant of the *king* at *Whitehall* 522, 523
Whether it can be committed of a lodger's chamber in houſe of another, and whoſe manſion-houſe it ſhall be ſuppoſed 556
If ſervant's lodging be broke open, whoſe manſion-houſe it ſhall be ſuppoſed 557
A tent or booth not a manſion-houſe, therefore provided for by ſtatute ib.
A ſhop is parcel of a manſion-houſe ib.

A. de-

A. demiſes to *B.* a ſhop parcel of his houſe, burglary may be committed of it, if leſſee or ſervants ever lodge *there*; *contra*, if they only work *there*. *Page* 557, 558

Where out-buildings, as barns, *&c.* are parcel of manſion-houſe, and burglary may be committed of them, or not. 558, 559, 567

Burglary, how antiently defined. 559

Whether breaking wall about houſe or gate thereof, and entring *per oſtia aperta*, be burglary ib.

Clearly not, if thief come over wall of the court ib.

Muſt be proved to be *eâ intentione* to commit ſome felony, not *ad verberandum*, tho killing may be the conſequence 561

Tho intent not accompliſhed, yet burglary, and ſo differs from robbery 561, 562

Intention muſt be of a felony by common law, and not *newly* made by *ſtatute* 562

Breaking houſe with intent to commit a rape, tho *per aſcun* no burglary, yet otherwiſe ib.

In burglary thoſe without aſſiſting, ouſted of clergy ii. 359

Simple burglary, 1. When any one in the houſe, and put in fear. 2. Where none put in fear, or none in the houſe. ii. 360

Principals ouſted of clergy in former by 1 *E.* 6. and in latter by 18 *Eliz.* 549, 555, 562, ii. 360, 361

Acceſſary *before* not ouſt [till late act]. ii. 361, 363

4 & 5 *P.* & *M.* extends not to burglary at large 564

Of ſpecial or improper burglaries, or larciny from, or robbing of houſes.

—Robbing one in his dwelling-houſe, the owner, &c. therein, and put in fear.

In what caſes, *(as verdicts, confeſſion, ſtanding mute, challenge* ultra *twenty, and not directly anſwering)* clergy taken away. *Page* 518, 548, 562. ii. 351

Acceſſaries *before* in all caſes aforeſaid ouſt on indictment, in what caſes only in appeal 521, 562, 563. ii. 362

23 & 25 *H.* 8. & 4 & 5 *P.* & *M.* require ſtealing as well as breaking 563. ii. 352, 361

Expoſition on 25 *H.* 8. as to ouſting clergy in a foreign county, revived by 5 & 6 *E.* 6. and now in force 518, 519, 536. ii. 341, 348, 351, 352

In 23 *H.* 8. a ſaving for clerks, but by 1 *E.* 6. equally exempt with others 517 to 521

Clergy allowed to one attaint 521 ii. 352

If a ſtranger only be in the houſe, clergy allowed ii. 352, 353

Breaking a houſe by day or night with intent to ſteal, any one being therein and put in fear.

In what caſes principal ouſt by 1 *E.* 6. both in appeals and indictments 520. ii. 353, 360, 361

Where in a foreign county by 5 & 6 *E.* 6. ii. 353, 360, 361

Acceſſaries *before*, ouſted. 562, 563. ii. 362

If breaking be in the night, ſuch breaking muſt amount to burglary, and then it ouſts clergy, if it be with a putting in fear, tho no robbery ii. 353

It requires an actual breaking, and an entry, to commit a felony, and ſo laid in indictment, and alſo a putting in fear. 548, 549

If it be in the day, it muſt be ſuch a breaking, as hath an actual robbery joined with it, to ouſt clergy ii. *Page* 353
In caſe of breaking a houſe in the day, committing a robbery therein, and putting in fear, tho one only enters, others preſent and aſſiſting ouſted of clergy. ii. 359

Robbing any perſon in his dwelling-houſe, the owner, &c. being in any part of the houſe, or within its precincts ſleeping or waking, tho there be no putting in fear, and this extends to booths in fairs.

Principal ouſt by 5 & 6 *E.* 6. on conviction only, [but by late act in other caſes]. 520
Acceſſaries *before*, where a robbery committed, and any perſon within the the houſe put in fear, ouſt by 4 & 5 *P.* & *M.* but not without robbery. 521, 548. ii. 355, 360, 361, 362
Actual breaking, ſuch as would make a burglary, and *taking* required, but not *putting in fear*. 526, 527, 548. ii. 354, 355, 362
How indictment muſt be laid. ii. 354
A thief coming into the houſe by doors open, breaks a chamber-door or counter, and takes goods, a breaking within this *act*, whether breaking a cheſt not fixed to the freehold be ſo. 523, 524, 526, 527
One coming to a tavern ſtole a cup brought him to drink in, the owner being in the houſe, was ouſted of his clergy on this *act*, *quære* 523
Robbing a ſhop in *Weſtminſter-hall* not within 5 & 6 *E.* 6. to be ouſted of clergy 524, 525
Where a ſervant ſhall be be ſaid to break the houſe, or not. ii. 354, 355
A ſtranger only being in the houſe, clergy not ouſted ii. *Page* 355
To what caſes it extends ib.
It extends to appeal, as well as indictment ib.
Whether, on this ſtatute, he that enters only be ouſted of clergy. ii. 359

Robbery to the value of 5s. out of any dwelling-houſe, or out-houſe thereto belonging, tho none in the houſe.

Principal ouſt by 39 *Eliz.* 524, 525
Acceſſaries *before* not [till late ſtatute]. ii. 357
To what caſes 39 *Eliz.* extends. 528. ii. 357
If none in the houſe, or it was in the night, or he ſtole, but broke not the houſe, party ſhall be convict of ſimple larciny, but not on the ſtatute ii. 356
Perſons aſſiſting without, but not entring, ſhall have clergy 526, 537, 563
An actual breaking, ſuch as would make a burglary in the night, and a taking required. 526, 527, 548. ii. 356, 357
4 & 5 *P.* & *M.* extends not to acceſſaries in any offenſe made after 522. ii. 363
Entring by the door open, and breaking open a cheſt and ſtealing goods to the value of 5s. not ouſted by this ſtatute, nor 5 & 6 *E.* 6. ii. 357
Entring by outward doors open, and breaking open, unlocking or unlatching an inward door, and ſtealing goods to 5s. ouſted of clergy on this act ib.
One breaking open a houſe by day, none being therein, and alſo breaking open a chamber-door and a cheſt, took out goods to 5s. and laid them on the floor, and before he could carry them out of the houſe was taken, ouſted of clergy. ii. 358
Chamber in an inn of court *domus manſionalis* within this *act*. ib

What breaking will bring party within 5 & 6 *E.* 6. & 39 *Eliz.* which will not make a burglary. *Page* 527

Burning in the hand. Vide **Clergy.**

Burning of houſes. Vide **Arſon.**

Canon Law. Vide **Laws.**

Capias. Vide **Outlawry, Proceſs.**

Certiorari.

CRIMINAL cauſes not capital, as indictments of riots committed in *Wales*, may be removed by *certiorari* into *B. R.* and when iſſued joined, it may be tried in next *Engliſh* county as well as in a *quo minus*. 157

Whether it lies into *Wales* on indictment of treaſon or felony, and for what ſpecial purpoſes, but not for trial of the fact, but it ſhall be ſent down by *mittimus* according to 6 *H.* 8. 158

A felony or treaſon committed in *Durham*, a *certiorari* lies to remove it into *B. R.* out of *Durham*, and to whom it is to be directed. ib

But if the party plead *not guilty*, it ſhall be ſent down thither to be tried. ib

Indictment of treaſon or felony removed out of county by *certiorari*, and party pleading, record ſent down by *niſi prius* to be tried; judge of *niſi prius* may on that record proceed to trial, judgment and execution, as juſtices of *gaol-delivery* by 14 *H.* 6. ii. 41

6 *H.* 8. extends to all juſtices as well of *gaol-delivery*, as of the peace, and enables *B. R.* to ſend to them the record itſelf, and by ſpecial mandate to command them to proceed to trial and judgment on ſuch iſſue joined, as they may command juſtices, before whom indictment taken, to proceed, if no iſſue joined ii. *Page* 41

Appeal taken before coroner, *certiorari* how to be directed ii. 67

If a *certiorari* iſſue to remove record, and *habeas corpus* the body, yet in felony, tho they be returned and filed, court may remand him and record by 6 *H.* 8. but in other caſes record cannot be remanded, but they muſt proceed in *B. R.* ii. 147

But if body removed by *habeas corpus*, and record by *certiorari*, and the record not filed, tho return of *habeas corpus* be filed, a *procedendo* may iſſue ib

If cauſe and body be removed into chancery by *habeas corpus* and *certiorari* returnable there, they may be ſent into *B. R.* if body only be returned with cauſes by *habeas corpus* into chancery, and delivered over to *B. R.* they may determine the return, and either by *procedendo* remand or grant a *certiorari* to certify record, and thereon commit or bail. ii. 147, 148

Where *B. R.* either on indictment taken before them, or removed thither by *certiorari*, may iſſue *cap.* and *exigent* into any county ii. 198

Barely on return of outlawry on *certiorari* without *exigent* indorſed and returned together with *certiorari* no writ of eſcheat lies for the lord ii. 206

But if *certiorari* directed to ſheriff and coroners, and *exigent* be extant in court, and they return this outlawry, poſſibly this may be a ſufficient warrant to enter it on record, as a return on the *exigent* ii. 206, 207

Certiorari to coroners to remove outlawry after party's death, not grantable ii. *Page* 207
For what purpoſes *B. R.* iſſues writs of *certiorari* ii. 210
With writ of error, *quod coram vobis reſidet*, formerly went a *certiorari* ib.
Habeas corpus removes the body, *certiorari* the record; court on return of former cannot give any judgment, or proceed on record of indictment without record removed by the latter, but proceedings ſtand in ſame force they did, tho return be adjudged inſufficient, and party inlarged; and court *below* may iſſue new proceſs on indictment, tho *contra* on *habeas corpus* in civil cauſes, for therein it is a *ſuperſedeas* ii. 210, 211
Certiorari's to remove indictments before juſtices of peace by 21 *Jac.* to be delivered at quarter-ſeſſions in open court; recognizance in what penalty, and with what condition to be entred into, otherwiſe not a *ſuperſedeas* ii. 211
By whom *certiorari* to be ſigned. ib.
To whom to be directed, where it iſſues to remove indictment taken before juſtices of a county palatine, or the mayor of *cinque ports* ii. 221
If they return privilege of county palatine or *cinque ports*, it ſhall not be allowed, but an *alias certiorari* iſſue, with a precept to produce their charters, whereby ſuch exemption is claimed. ii. 212
Delivery of it doth not hinder taking an indictment after ib.
Indictments taken after *teſte* of *certiorari*, and before or after delivery thereof, ought to be removed; and if court below proceed afterwards, proceedings void; and juſtices *below* in contempt, whether they proceed at ſame ſeſſions or private ſeſſions after ii. *Page* 212, 215
Certiorari to remove all indictments againſt *A.* and *B.* removes all indictments wherein *A.* and *B.* are indicted, either alone, or together with any other ii. 212
Where one indictment is againſt divers men, and the offenſes are ſeveral, as in caſe of indictment againſt divers perſons for keeping ſeveral diſorderly houſes, a *certiorari* removes it only as to thoſe named in it; and as to the others record remains *below*; but *contra*, if juſtices *per manas ſuas proprias* deliver the bill into court againſt them all, as they may, and a record be made of that delivery ii. 214
If divers be indicted, and one tender ſecurity for coſts, it is ſufficient ii. 212, 213
If indictment be at private ſeſſions, it ought to be delivered into quarter-ſeſſions, but delivery of *certiorari* at private ſeſſions cloſeth hands of juſtices, tho allowance of writ and tender of ſecurity muſt be by ſtatute at quarter-ſeſſions ib.
Feme covert not within 21 *Jac.* to find ſureties ii. 213
If *certiorari* ought to be allowed, proceedings of juſtices of *coram non judice* ib.
Removal of indictment of forceable entry by proſecutor, not within 21 *Jac.* ib.
Indictment of forceable entry at ſeſſions of the peace, and reſtitution awarded, and after ſeſſions, and before reſtitution actually made, a *certiorari* delivered to one juſtice of peace; before 21 *Jac.* it cloſed up their hands, and no reſtitution was awarded, but juſtice made a *ſuperſedeas* thereon; and the ſame law now remains on indictments of forceably entry found at private ſeſſions ib.

Difference between writ of error and *certiorari*, as to superseding proceedings ii. *Page* 213
Certiorari a *superfedeas* from the delivery thereof for ever, unless a *procedendo* issue ib.
In what cases variance between *certiorari* and record causeth record not to be removed. ii. 214, 215
Tho judicial proceedings void after *certiorari* delivered, whether ministerial be so ii. 215
Record not removed before return ib.
After *certiorari* issued and delivered, and before record removed, inferior judge may be enabled to proceed by *procedendo* or *superfedeas* out of *B. R.* ib.
Record removed and filed, at common law, no *procedendo* could be granted, nor record remitted; but *contra* by 6 *H.* 8. ib.
Difference between *certiorari* in *B. R.* and chancery: In *B. R.* record itself is removed, and what remains below is but a scroll; but usually in chancery, if *certiorari* be returnable there, tenor of record only is removed; and if tenor of record of indictment, attainder or conviction be removed by *certiorari* into chancery, and thence sent by *mittimus* into *B. R.* they cannot thereon proceed to judgment or execution ib.

Vide Habeas Corpus.

Challenge.

Challenge for want of freehold allowed in treasons, misprisions of treason, and murders by stat. 283
One outlawed in trespass, neither lawful juryman, nor indictor in felony or treason. 303. ii. 155*, 277
Whether father or son, or adversary in a suit, be a lawful juryman *Page* 303. ii. 155*, 277
Jurors to be freemen, regularly freeholders 264
Legales, *i. e.* without any just exception ib.
Division and subdivision of challenges ii. 267
By common law, if one outlawed of felony, &c. brought error on outlawry, and assigned error in fact, whereon issue was joined, he should not challenge peremptorily ib.
Like law, if he had pleaded any foreign plea in bar or indictment ib.
But if one had been indicted or appealed of treason or felony, and had pleaded *not guilty*, or any other matter of fact triable by same jury, and pleaded over to the felony, he might have challenged peremptorily any jurors under the number of three whole juries ii. 267, 268
If twenty indicted for same offense by one indictment, every prisoner allowed his challenge of thirty-five ii. 268
If but one *venire fac.* awarded to try them, persons challenged by any one drawn against all. ii. 263, 268
But in treason, if prisoner challenge above thirty-five, and insist on it, and will not leave his challenge, it amounts to *nil dicit*, and judgement of death shall be given ii. 268
By 22 *H.* [illegible]. none arraigned for petit treason, murder or felony, shall peremptorily challenge above twenty ii. 269
In high and petit treason challenge of thirty-five now allowed, because 1 & 2 *P.* & *M.* restores trial of petit treason to the course of the common law. ii. 269, 339
In petit treason, if party challenge thirty-six peremptorily, he shall have judgement of penance, as well

welr in appeals as indictments, and in caſe of women as well as men ii. *Page* 399, 400

Acts ouſting clergy in caſe of challenging above twenty, import, that by ſuch challenge party ſhould be convict; but yet if he challenge above twenty, he ſhall not have judgment of death, but only his challenge ſhall be overruled, and jurors ſhall be ſworn ii. 269, 270, 339, 345

If priſoner challenge ſix of the jurors for cauſe, and cauſes be found inſufficient, and the ſix are ſworn, whereby inqueſt remains *pro defectu juratorum*, a *tales* granted, and jury appear, the priſoner may challenge peremptorily any of the ſix; but if it happen, that a new cauſe of challenge intervene after former ſwearing, and he challenge for cauſe, he muſt ſhew the cauſe happened after former ſwearing ii. 270, 274

If priſoner on firſt pannel challenge fifteen peremptorily, and then jury remains for default of jurors, and a *diſtringas* with forty *tales* is granted, he ſhall challenge peremptorily no more than will fill up his number. ii. 270

The ſeveral kinds of challenges for cauſe ii. 271

No principal challenge either to array or poll, that ſheriff or juror is of *king's* livery, but he muſt conclude to the favour. ib.

If alien be indicted or appealed of felony, tho indictor ought to be *Engliſh*, yet by 28 *E.* 3. trial ſhall be *per mediatatem linguæ*, [illegible] *Egyptians* ib.

This ſtatute extends as well to felonies made after as before ib.

Extends not to trial of aliens for treaſon ib.

If alien indicted of felony plead *not guilty*, and a common jury be returned, if he ſurmiſe not *his being an alien* before any of jury ſworn, he hath loſt that advantage; but if he ſurmiſe it, he may challenge the array for that cauſe, and thereon a new *venire fac.* ſhall iſſue, or award be made of a jury *de medietate linguæ*; but more proper to ſurmiſe it on plea pleaded. ii. *Page* 272

In treaſon or felony, whereto priſoner pleads *not guilty*, at common law four hundreders ought to be returned ib.

35 *H.* 8. requiring ſix hundreders, and 27 *Eliz.* requiring only two in perſonal actions, extend not to trials on indictments of treaſon or felony ib.

Yet never any challenge for default of hundreders on trial of indictments for felony or treaſon ib.

By 33 *H.* 8. for treaſon or felony committed in *king's* houſhold, all challenges, ſave for malice, ouſted ib.

By 2 *H.* 5. none to be jurymen on trial of capital felony, *unleſs* he have a freehold of 40s. *per ann.* above all charges, if he be challenged, and by conſtruction it muſt be land in ſame county. ii. 272, 273

He muſt not only be ſeiſed thereof at time of pannel made, but when he comes to be ſworn; elſe may be challenged ii. 273

27 *Eliz.* hath raiſed it to 4l. *per ann.* yet that extends only to iſſue joined in *B. R. C. B.* and Exchequer, and juſtices of aſſiſe, and not to juſtices of gaol-delivery, *oyer* and *terminer*, or the peace; but theſe trials ſtand as they did by 2 *H.* 5. ib.

By ſtatute *defectus annui cenſûs* no challenge as to aliens, but yet remains a good challenge to the other half, who are denizens. ii. 274

By ſtatute, on trials of felonies in cities or boroughs, a citizen or burgher worth 40l. perſonal eſtate may paſs, tho he hath no

freehold; but Knights or Eſqrs. *living there, not within this proviſion* ii. *Page* 274
33 H. 6. of indictments of perſons *living in Lancaſhire*, extends not to trials ib.
By ſtatute challenge allowed of any perſon living in the ſtews of *Southwark*, tho of ſufficient freehold ib.
Where priſoner challengeth for cauſe, he ought to ſhew it preſently; muſt ſhew all his cauſes together ib.
If in trial of indictment of felony eleven be ſworn, and the twelfth challenged, whereby inqueſt remains, *&c.* and a *diſtringas* with a *tales* iſſues, and jurors appear, *king* ſhall not challenge any of the eleven ſworn, ſave for cauſe happened ſince their ſwearing; if it happen before, tho not known till after, it ſhall not be allowed; jurors to be called, as they happen in the pannel ib.
Same law for challenge by priſoner for cauſe ib.
Of trial of a challenge for cauſe made to the poll. ii. 274, 275
If a juror be challenged before any juror ſworn, by whom, and how challenge tried, and by whom the next and the reſt of the challenge tried ib.
If plaintiff challenge ten, and priſoner one, how challenge tried. ii. 275
If ſix ſworn, and reſt challenged, by whom challenges tried ib.
In diſcretion of court, by whom array to be tried ib.
In trial of peers no challenge allowed ib.
Tho *king* pardons an infamous man, he ſhall not be a juryman ii. 278
Priſoners to challenge jurors before they are ſworn ii. 293
If juryman, before he be ſworn, take information of the caſe, it is cauſe of challenge ii. 306
In petit treaſon, 1 & 2 *P. & M.* reſtores peremptory challenge of thirty-five; if priſoner challenge above thirty-five, he by that ſtatute ſhould have had his clergy, being *caſus omiſſus*, but clergy now ouſted by 4 & 5 *P. & M.* ii. *Page* 339
In inqueſts of office, no challenges ii. 378

Vide Jury, Mute.

Chancery.

As to *Engliſh* proceedings is no court of record; but proceſſes under great ſeal in order thereto are matters of record 649
By virtue of order made for commitment of one, till he enter into bond, *&c.* warden of fleet may juſtify impriſonment of party ii. 122
Chancellor hath no power to proceed in criminal cauſes ii. 147
Habeas corpus ad faciendum & recipiendum, iſſued by chancellor to remove perſons arreſted in civil caſes unwarranted by law, and as to perſons in execution prohibited by ſtatute ii. 148
For habeas corpus ad ſubjiciendum *iſſuing out of chancery*. Vide Habeas Corpus.
For Certiorari. Vide Certiorari.

Cheats.

Receiving money by *falſe tokens* puniſhable at common law, or by ſtatute 506
One maiming himſelf for a colour to beg, how puniſhed 412
Civil ſubjection. Vide Coverture, King, Maſter, Servant, Parent and Child.
Civil Law. Vide Laws.

Clergy.

A relaxation of the ſeverity of judgment of law 517

In manſlaughter committed by huſband and wife, formerly he had clergy, but the not. *Page* 46

In ſome treaſons antiently allowed 181, 185, 186. ii. 326 to 329

But never in treaſons touching *king*'s perſon. 223, 517. ii. 330, 334

In *petit treaſon and murder*, in what caſes, as verdict, *&c.* taken away, both in appeals and indictments, from principal and acceſſary *before*, not *after*. 382, 450, 466. ii. 129, 336 to 343, 344

By 1 *Jac. of ſtabbing*, he who ſtabs only ouſted, and in what caſes, both in appeals and indictments, but in all other caſes of manſlaughter allowed. 468. ii. 344, 345

If he, that actually gave the ſtroke, be indicted as preſent and aſſiſting to another ſuppoſed to have given it, and be convict, on ſuch indictment he ſhall have his clergy; *contra* in murder. ii. 344, 345

Knowingly aiding and comforting a jeſuit out of hold, ouſted. 336, 688

Servants embezzling their maſters goods formerly had clergy. 505. ii. 367

Clergy allowed till 25 *E.* 3. *pro clero*, in all treaſons and felonies not touching *king* himſelf, ſave in two felonies, *viz. inſidiatio viarum & depopulatio agrorum & arſon*, clergy allowed in former by 4 *H.* 4. 517. ii. 328, 332, 333, 335, 346

25 *E.* 3. *pro clero* made *Hillary* in ſame year ii. 330

Indictment and evidence muſt both bring caſe within *act* ouſting clergy, otherwiſe allowed 517, 525, 526, 535. ii. 336

If felony be ſo laid as to come within *act*, yet if evidence come not up to it, where priſoner is to be found guilty only of ſimple felony ii. 336

Robbing in or near the highway, whether on appeal or indictment, and in what caſes, as verdict, *&c.* ouſted of clergy *Page* 517, 518, 519, 535. ii. 348 to 351

Acceſſaries *before*, not *after*, ouſted. 519. ii. 350

Indictment, *in vel prope*, ſufficient to aſcertain clergy 535

Where acceſſary *before* ouſted of clergy, *a fortiori* principal. 522. ii. 246, 247

Horſe-ſtealing, principal and acceſſaries *before* and *after* ouſt in all caſes. 528, 529. ii. 364, 365

Larciny from the perſon, clam & ſecrete, principal ouſted, but not acceſſaries; if under 12*d.* it remains petit larciny. 529. ii. 365

Acts ouſting clergy alter not the offenſe, but ouſt clergy where offenſe capital, as in grand larciny 531

Voluntary eſcape, reſcue and breach of priſon within clergy, tho principal felony not 599, 607, 612

Rape, principal ouſt, but not acceſſaries *before* or *after* 633. ii. 345

Formerly priſoner ſtanding mute, or not directly anſwering, had his clergy ii. 345

Forceably carrying away women and marrying them, principals and acceſſaries *before*, ouſted 661

Whether receiver being made principal by ſtatute, be ouſted. ib.

Acts ouſting clergy from 24 *Apr.* 1 *H.* 8. repealed by 1 *E.* 6. ſave in caſes excepted, which ſee 667, 679

Forging a deed after former conviction and judgment, ouſted. 682, 686

Clergy allowed without ſpecial words to ouſt it. 704. ii. 334, 335

Reſtored to *grand larciny committed within king's palace*, tho party convict by 33 *H.* 8. ii. 7

And to *breaking king's houſe with intent to ſteal*, tho arraigned according to that *act* ii. *Page* 7

In all crimes within 28 *H.* 8. for trial of treaſons, *&c.* done on the ſea, clergy allowed, ſave in *treaſon, piracy and murder.* ii. 17

Juſtices of *niſi prius* may allow clergy to a convict of manſlaughter ii. 41

What words in indictment of *murder* ouſt clergy. ii. 129, 187, 344

By 8 & 18 *Eliz.* clergy diſcharges all offenſes precedent within, but not without clergy ii. 254, 387, 388

By 18 *Eliz. burning in the hand*, ſubſtituted in lieu of delivery to the ordinary ib.

As to *acts* ouſting clergy in caſe of *challenging above twenty*, party ſhall not have judgment of death, his challenge only over-ruled ii. 270

If judgment of *peine fort & dure* be given, yet if offenſe within clergy, clergy allowed ii. 320, 380

Judge ought to allow it (tho ſtrictly priſoner ought to pray it), and prays it not ii. 321, 378, 379, 381

Antiently clergy prayed and allowed on arraignment of priſoner, now rarely done but on conviction or ſtanding mute ii. 323, 377, 378

Claim by clergy of exemption from ſecular juriſdiction growing intolerable, how they were abridged therein ii. 325

In civil ſuits had no exemption, ſave by ſpecial *acts*, from arreſt, by *cap.* on *ſtat merchant* ib.

If on *diſtringas* one was returned *clericus beneficiatus non habens laicum feodum*, proceſs iſſued to biſhop to bring him in ib.

In caſes criminal, not capital, as treſpaſs, petit larciny, *&c. privilegium clericale* not allowed ii. 325, 326

By canon laws nuns were exempt from temporal juriſdiction, but whether by common law; other women had no privilege of clergy, but by ſtatute ſhall be burnt in the hand ii. *Page* 320, 328, 371, 372

Ordinary but a miniſter; *king*'s courts judges of allowance or diſallowance of clergy and purgation ii. 328, 380, 381

In what caſes they would often deliver clerk to the ordinary *abſque purgatione* ii. 328, 329

If ordinary admitted him in ſuch caſes to his purgation, he was finable, and party delivered by ſuch purgation recommitted to priſon ii. 329

If clerk had his clergy, and was generally delivered to the ordinary, he might admit him to make his purgation, and on *ſignificavit* into chancery a writ iſſued to ſheriff to deliver party his goods and chattels ſeiſed, *niſi fugam fecerit eâ occaſſione* ii. 329

Where new felony made by ſtatute, clergy incident thereto ii. 320, 330

Clergy allowed before 25 *E.* 3. in *treaſon for counterfeiting the ſeal and coin.* ii. 331, 332

In all treaſons, whether declared by 25 *E.* 3. *de proditionibus*, or made ſince, clergy ouſted. ii. 332

Clergy allowed in ſacrilege after 25 *E.* 3. *per clero*, but if ordinary refuſed the clerk, he had not his clergy ii. 333

Sacrilege not ouſted at common law ii. 366

But ouſted by 23 *H.* 8. 517. ii. 333, 365

4 & 5 *P. & M.* extends not to it ii. 366

A ſtatute generally enacting, that a crime ſhall be felony without clergy, or that offender ſhall ſuffer as in felony without clergy, clergy ouſted to all intents ii. 385

Acts

Acts ousting clergy construed strictly ii. *Page* 335, 371
Clergy ousted as to principal, not ousted as to accessary; if as to accessary *before*, not as to accessary *after*; if where prisoner is convict by verdict, it holds not as to conviction by confession, nor attainder by outlawry, nor standing mute. ii. 334, 335
Every indictment to oust accessary *before* of his clergy on 1 & 2 *P.* & *M.* must run *malitiose.* ii. 339, 342
Where *act* ousting clergy mentions indictments, but not appeals, appellee within clergy ib.
Whether clerk attaint of *petit treason* by outlawry may claim his clergy, and be delivered to the ordinary as a clerk attaint without purgation ii. 341, 342
In robbery committed on a man's person, those, who are present and assisting as well as taker, ousted ii. 359
How far *piracy and felonies on the sea* ousted of clergy ii. 368, 369, 370
Piracy, being not taken notice of as felony by common law, was not thereby ousted of clergy ii. 270
Exemption of clergy extendible to admiral's jurisdiction before 28 *H.* 8. ib.
How much of 33 *H.* 8. ousting felonies in *king*'s household of clergy, repealed by 1 *E.* 6. ib.
By statute of bigamy, *Bigamus* ousted of clergy, but now shall have clergy ii. 372
At common law, if clerk convict had broke bishop's prison, and [illegible] after [illegible], he had lost his clergy ib.
Clerks convict are now to be *burnt in the hand*, and discharged ib.
By antient law prisoner, not having *habitum & tonsuram clericalem*, had not his clergy ib.
Or ordinary might have refused him, if he could read ii. 372, 373
Heretick, *convict*, a *Jew* or *Turk* shall not have clergy; *contra* of one *excommunicate* ii. *Page* 373
A *Greek* or *Alien* shall have his clergy, and read in a book of his own country ib.
So shall a *bastard*, one *blind* ib.
By 4 *H* 7. one not in orders that hath once had his clergy, shall be burnt in the hand, and shall not have his clergy again; but a clerk in orders shall have his clergy a second time ii. 373, 389
How clerks in orders shall prove themselves such ib.
None ousted of clergy a second time by the bare mark; if prisoner deny himself to be the same person that had his clergy, how tried ib.
Of holy orders and inferior orders, or *clerici in minoribus.* ii. 373, 374
Clergymen, whether principals or accessaries, have now no more privilege than laymen, save that they are not burnt in the hand; but *quære*, whether, if attaint by outlawry, they shall have more privilege than laymen ii. 374, 375, 376, 389
Tis a mistake, that if a clerk in orders challenge above twenty, he shall lose his clergy a second time ii. 376
By 1 *E.* 6. Peers to have clergy, but for first offense not to be burnt in the hand, or put to read ib.
How they must pray their clergy; how court to be ascertained of their peerage 376, 396
This *act* extends not to clergy ousted by any subsequent statute, but to what cases ib.
Whether it extends to felonies within the same, where they cannot make purgation, as if they abjure, confess, or be outlawed ii. 276, 277, 390
Never meant that a peer should be put to read, or burnt in the hand in any case ii. 376, 377

Clergy

Clergy allowed to an attaint. *Page* 521. ii. 379
Where judges may allow clergy under the gallows, if they go that way; but whether it may be done by juſtices of *oyer* and *terminer* after their ſeſſions, *quære*; but they may reprieve him, and allow him clergy at the next ſeſſion ib.
If one cannot read, and *non legis* be recorded, and court reprieve him to another ſeſſions, and in the mean time he learns to read, he ſhall have his clergy ib.
So if judgment of death be entred upon *non legit* returned ib.
One abjuring after his return ſhall have his clergy ib.
Approver diſavowing his appeal, vanquiſhed in battle or recreant, ſhall have his clergy ib.
If ordinary return *non legit*, court may give him the book and hear him, and ſo in abſence of ordinary ii. 381
Judge uſually appoints verſe the clerk ſhall read ib.
The entry of clergy ii. 382
By 18 *Eliz.* a convict within clergy forfeits all his goods he had at the time of conviction, tho *burnt in the hand* ii. 388
Yet may purchaſe and retain other goods, and on *burning in the hand* ſhall be reſtored to his lands ii. 388, 389
If *king* pardon it, he may purchaſe and retain goods ii. 389
After clergy and *burning in the hand*, a clerk in orders ſhall not be proceeded againſt by eccleſiaſtical judge to deprivation, or other cenſure, for it amounts to a pardon ib.
He ſhall have ſame privilege as if he had been *burnt in the hand* ib.
Plea of *auterfoits convict*, and had his clergy, as good bar as before 18 *Eliz.* ii. 390
A conviction of manſlaughter, and that he was a clerk and ready to read, if court would have allowed, a good bar to an appeal, tho court had called him to judgment, but continued him on a *curia adviſare vult.* ii. *Page* 390
How prayer of clergy entred ib.
Where principals and acceſſaries before *ouſted of clergy in proper burglary.* Vide **Burglary.**
In what caſes, as verdict, &c. *and under what circumſtances principals and acceſſaries* before *ouſted in ſpecial or improper burglaries*, or not. *Vide* ſubdiviſions under **Burglary.**
Vide **Felonies by Statute**, &c.

Clerk of the Crown, Aſſiſe and Peace.

To certify into *B. R.* names of perſons outlawed, attaint, or convict ii. 36, 37
Tho clerks of aſſiſe enter reſpites and awards of execution only in a book of *Agenda*, yet regularly are ſuppoſed to be entred of record, and theſe memorials are warrants for ſuch entries 370

Clipping. Vide Coin.

Coin.

A diſſertation on the coin and coinage of *England* 188 to 210
What *ſterling* imports, what the ſtandard of it 188, 189, 203, 204
Weight, allay, and intrinſic value of coin *intra jura majeſtatis* 191, 192, 204
Franchiſes of coinage anciently granted by the *king* 191, 192
Where proclamation neceſſary to inhanſe or decry coin, &c. 196, 197, 198
Where neceſſary to make foreign coin current, and what evidence to prove it legitimate 197, 198, 213, 310, 316, 327

How

How impairment in weight and allay may happen *Page* 205
Payment *in numero, ad ſcalam, ad penſum*, explained ib.
Dealbare firmam expounded 206
Difference between ſo much *numero*, and ſo much *blanc* 206, 207, 208
Exportation of bullion, gold and ſilver, not felony, but cauſes a forfeiture 654 to 657
Counterfeiting foreign coin legitimate by proclamation, treaſon 192, 210, 211
Counterfeiting foreign money not legitimate, not treaſon within 23 *E.* 3. but miſpriſion of treaſon 210
Whether counterfeiting *farthings* or *halfpence* be within 25 *E.* 3. ib.
What ſhall be ſaid the *king*'s coin 211, 212
What evidence that it is ſuch 196, 197, 213, 310
In what caſes the *minters* guilt of treaſon 213
Not compaſſing, but actual counterfeiting, treaſon 214
Yet if many conſpire, and one counterfeits, treaſon in all ib.
Receiver not a principal in this treaſon 233
Uttering counterfeit money purſuant to agreement precedent to the fact, treaſon 214
One knowing counterfeiter, and uttering the falſe money after the fact without ſuch agreement, is *quaſi* a receiver of him ib.
Barely uttering falſe money knowingly is only a cheat, and not miſpriſion; but to know counterfeiter and conceal it, miſpriſion 214, 373, 375
Knowledge of the fact, and bare concealment, miſpriſion only 214
Counterfeiting the ſtamps barely [till late act], not treaſon ib.
Counterfeiting coin, without uttering, treaſon 215, 228
Tho in another metal, and with a different impreſſion to elude the law, treaſon 215
Clipping, waſhing, or impairing foreign coin legitimate by proclamation, treaſon 5 *Eliz.* but no corruption of blood, or loſs of dower *Page* 215
Whether clipping, &c. *king*'s coin be treaſon within 25 *E.* 3. material as to judgment ib.
How the law ſtood with reſpect to clipping, waſhing, &c. from 25 *E.* 3. 215 to 222
Falſifying, impairing, ſcaling, or lightning *king*'s coin, or foreign coin legitimate, treaſon by 18 *Eliz.* but without corruption of blood, or loſs of dower 218, 219
What evidence neceſſary on 5 & 18 *Eliz.* againſt impairing and clipping foreign coin to prove it legitimate 213
Indictment for clipping or impairing, &c. muſt purſue 5 & 18 *Eliz.* and how conclude 220
Two witneſſes not neceſſary, either on trial or indictment 221, 297, 298
Iriſh coin of baſer allay, tho *king*'s coin, not current here 221, 222
Whether counterfeiting it be treaſon within 25 *E.* 3. 211
But clipping, &c. *Iriſh* coin *here*, treaſon 221, 222
How counterfeiters of coin puniſhed before 25 *E.* 3. and how ſince 222 to 225
Knowingly importing falſe money *ad inſtar* the *king*'s coin, with intent to merchandize or pay, treaſon; by what intent to be tried 225, 228, 229, 317
Counterfeiting out of the realm triable by ſtatute in *B. R.* or before ſpecial commiſſioners; but otherwiſe at common law 225
Importing counterfeit coin from *Ireland*, or the *Iſle of Man*, not treaſon 225, 226, 317
Antient ſtatutes againſt importing falſe money 226, 227
This offenſe never ſettled to be treaſon before 25 *E.* 3. which makes only the apporters and their

their aders, traitors, but not receivers at fecond hand *Page* 227
Knowingly importing falfe money *ad inftar* foreign legitimate coin, treafon by 1 & 2 *P. & M.* 227, 228
Counterfeiting foreign coin not current here, a fubftantive mifprifion of treafon by 14 *Eliz.* 228, 376

Command. Vide Principal and Acceffary.

Commiffion.

Juftices of gaol delivery fit one day, and forget to adjourn their commiffion, or clerk to enter it, and a felony being done next day, they proceed in feffions, and take indictment, and give judgment of death, it is erroneous, and record not amendable 498, 499. ii. 156*
Where neceffary to enter adjournment or not; feffion relates to firft day, and no longer; records entred as of firft day 499. ii. 24, 261
Where proceedings of judges in capitals, without ftrict extent of their commiffions, or where determined, is a great mifprifion 498, 499
King dies after commiffion of gaol-delivery iffued, they fubfift till notice 499. ii. 24, 25
By what means commiffion of gaol-delivery determined ib.
Of the different kinds of fpecial commiffions of *oyer* and *terminer* ii. 10 to 22
Commiffion *pro hâc vice* may continue their feffion from day to day by adjournment ii. 24
Superfedeas fufpends power of commiffions, but *procedendo* revives it ii. 25
Where a fpecial new commiffion determines a former general commiffion *pro tanto* ii. 20, 25
Where a general and fpecial commiffion are dated fame day, both ftand ii. *Page* 26
A commiffion of one nature fuperfedes not commiffion of another ib.
All affociations are commiffions ii. 40
Former commiffions were determined by new ones at common law ii. 401, 404
In which cafe record and prifoner were removed into *B. R.* who ceeded where juftices left off ii. 404
By 11 *H.* 6. proceedings before juftices of peace, not difcontinued by new commiffion ii. 405
Nor before juftices of *gaol-delivery*, and *oyer* and *terminer* by 1 *E.* 6. ib.

Vide Admiralty, Court, Gaol-delivery, Juftice of Affife, Juftice of Peace, King's Bench, Oyer and Terminer.

Commitment.

One bailed or committed not to be difcharged till convict or acquitted, or delivered by proclamation 583
Mittimus ground of felony in cafe of breach of prifon ib.
Ought to be in writing under feal, unlefs by court of record; if not, what the effect 583, 584, ii. 122
It muft expreſs the cauſe, and if felony, the *fpecies* ib.
Tho cauſe not inſerted, gaoler in falſe impriſonment may aver that it was for felony 584, 585, 609. ii. 123
Ought to be to the common gaol of the county; but if offenſe committed, and party taken within a franchiſe, then to gaol *there* by ſtatute 585. ii. 123
If it expreſs larciny above value or manſlaughter, tho in fact only petit larciny, or *ſe defendendo*; eſcape, felony 609

Suf-

Sufficient, if it be generally for felony *Page* 609, 610
Antiently more committed without *mittimus* than with it 610
Mittimus not of so antient date as justices of peace ib.
Tho no cause expreſt, ſufficient that gaoler or priſoner hath a proper notice of offenſe to make voluntary eſcape or breach of priſon felony 610. ii. 123
In chancery, if order be made for commitment, till party enter into bond, &c. warden of fleet may thereby juſtify impriſonment ii. 122
Proper to mention name of juſtice and his authority in beginning of *mittimus*, tho not always neceſſary ib.
It muſt have a certain date of the year and day, and an apt concluſion ii. 122, 123
Thoſe things are regular, *viz. cauſe, juſtice committing, date, apt concluſion*, yet warrant not void, that hath not all theſe circumſtances 584, 585, 609. ii. 123
If concluſion be till further order by juſtice, it binds not up hands of other juſtices, *quoad* bailing or delivering priſoner ib.
Sometimes juſtices ſend bailable priſoners, not having their bail ready, to ſome private priſon, as new priſon, &c. till they can find bail; but this diſliked by the judges ib.
If priſoner bailable, juſtices not to demand, but priſoner to tender it, otherwiſe juſtice may commit him ib.

Vide Arreſt, Breach of Priſon, Eſcape, Juſtice of Peace, Reſcue.

Computation.

Of the *year, day, and waſt* 360
Of the year and day wherein to bring appeal 427

Concealment.

For concealments by grand inqueſt. Vide Jury.

Vide Miſpriſion.

Condition. Vide Forfeiture.

Confeſſion.

Court not to record confeſſion of infant under twenty-one, but to put him to plead *not guilty*, or inquire by inqueſt of office of the fact *Page* 24
Voluntary confeſſion of treaſon before a privy counſellor or juſtice of peace, ſufficient to ſatisfy 5 & 6 *E.* 6. not neceſſary to be in court 304
A ſimple confeſſion is a conviction; but court, if crime ouſted of clergy, uſually adviſe party to plead ii. 225
If it be but an extrajudicial confeſſion, tho it be in court, as where priſoner freely tells the fact, and demands opinion of court, whether it be felony, tho it appear to be felony, court will not record his confeſſion, but admit him to plead to felony *not guilty* ii. 225, 226

Conſent. Vide Principal and Acceſſary.

Conſtable. Vide Arreſt, Juſtice of Peace, Peace-officer, Homicide, Murder and Manſlaughter.

Conſtable and Marſhal.

Judices ordinarii of caſes within martial law; their juriſdiction defined 500
Where it is murder to execute another by martial law in time of a peace 499, 500

Neither

Neither ſoldiers, nor mariners on land or at ſea, in actual ſervice, to be capitally proceeded againſt by martial law in time of peace *Page* 500
Leges maritimæ differ from martial law; by thoſe admiral had juriſdiction in capital offenſes committed on the ſea ib.

Conſtruction.

For conſtruction of grants. Vide Grants.
For conſtruction of ſtatutes. Vide Statutes in General.

Conviction.

Where ſecond offenſe ſubject to ſeverer puniſhment than former, there muſt be a previous conviction of former 324
Where forging a deed after former conviction, is felony by 5 *Eliz.* it muſt be conviction by judgment 384, 682 to 687
Preſentment by grand inqueſt not ſufficient conviction of a negligent eſcape 603
What a proper conviction thereof ib.

Vide Pleas, Verdict.

Coroner.

Whether inquiſition before him of flight be traverſable 363, 414, 415. ii. 63, 64, 301
Where his inqueſt, as to flight, ſhall be taken for the *king*, before that of a petit jury 363, ii. 63, 154, 301
Such inqueſts only *quaſi* inqueſts of office 363. ii. 63, 154, 301
Has power to inquire of acceſſaries *before*, but not *after* 363, 416. ii. 63, 65
Two in a county, whether outlawry to be given by one or both; one may take inquiſition *ſuper viſum corporis* 417. ii. 56
Inquiſition *de villis A. &c.* without ſaying *de quatuor villatis proximè adjacen'*, according to ſtatute inquiſition good; ſtatute only directory; coroner to iſſue precept to conſtable to ſummon jury, twelve at leaſt *Page* 416. ii. 59, 152*
By ſtatute to return inquiſitions taken by him to next *gaol-delivery*, or *B. R.* 418. ii. 58
Where one is killed *per infortunium*, but not by man, what he is to enquire of 418, 419
One drowned in a pit, he may charge townſhip to ſtop it, and enter it in his rolls; and if not done before next *gaol-delivery*; townſhip amerced 422. ii. 62
If he on notice refuſe to inquire of one come to a violent death, how and before whom puniſhable 424. ii. 58
Ought to inquire of death of one dying in gaol 432. ii. 57, 157
Ought to hear evidence on both ſides 415. ii. 60
Where coroner ordered to inquire *de novo ſuper viſum corporis* 415. ii. 59, 60
Where a writ of *melius inquirendum* ſhall, or not be granted 415, 416. ii. 59, 60, 69
In *homicide* by neceſſity, the matter may be ſpecially preſented, either by grand or coroner's inqueſt, and thereupon party preſently diſcharged, without being put to plead; but he may be indicted again, if matter of former indictment falſe; *contra*, where indictment ſimply of murder or manſlaughter 491, 492
Whether inquiſition *ſuper viſum corporis*, finding one *felo de ſe*, be traverſable 414, 415. ii. 59, 60, 154
If body cannot be ſeen, death inquiſible before juſtices of *oyer* and *terminer*, or peace 414, ii. 65. 419
Where either coroner of county, or admiral may take inquiſitions in great rivers ii. 16

Stroke

Stroke in one county, death in another, juſtices, or coroner of county where party died, ſhall inquire and proceed, as if ſtroke in ſame county. *Page* 426, 427 ii. 66

B. R. is ſovereign coroner in *England* ii. 5

Coroners may attach manſlayers by their warrants, after inquiſition, finding them guilty ii. 107

May alſo make out warrants for taking perſons, that neither are, or can be preſented before them, as perſons preſent and not guilty; and alſo burglars and robbers, tho they cannot take an inquiſition touching them ib.

If it be found *ſuper viſum corporis*, that the felon fled, and was killed in the flight, this preſentment, tho after party's death, is concluſive as to forfeiture for the flight ii. 154

11 *H.* 4. of the return of inqueſts extends to coroners inqueſts ii. 60, 61, 155*

Inqueſt to be *probi & legales homines*, and of the proper county ii. 167

Where two coroners in a county, in miniſterial acts return to be by both ii. 104

Juſtices of *oyer* and *terminer*, or of peace cannot aſſign a coroner, as juſtices of *gaol-delivery* may ii. 32

Coroner may take indictment of *ſe defendendo* ii. 46

Three kinds of coroners, and who they are ii. 53

Mayor of *London* by charter coroner thereof ib.

Biſhop of *Ely* hath power to make them in the *Iſle* ib.

By ſtatute power of electing coroners confirmed to counties, yet a ſaving to *king* and other lords, who ought to make ſuch coroners ib.

So *king* may grant coroners within certain precincts; and lords of franchiſes, having power to nominate them by charter, may ſtill do it without election ii. *Page* 54

Admiralty and verge by *king*'s grants have power of granting, or having coroners ib.

Of death of man, or other articles belonging to coroner, ariſing on the high ſea, inquiſitions have been uſually taken by coroners appointed by *king*, or his admiral, and coroners of county have no juriſdiction ib.

Inquiſitions taken before coroner of admiral are returned before commiſſions on 28 *H.* 8. and inquiſition before coroner of county are returned before commiſſioners of *gaol-delivery* for the county ib.

Coroner of the verge, or of *king*'s houſe, by who nominated, his power; coroner of county by ſtatute to join in inquiſition of death of a man, what caſe excepted ii. 54, 55

But he cannot take inquiſition without coroner of verge; but both offices united in one, inquiſition taken before him is good; and if court remove, he may proceed on the inquiſition, as coroner of county ii. 55

In what caſe coroner of houſhold ſhall take inquiſition without coroner of county by a jury of the houſhold; the return and proceedings on theſe inquiſitions regulated by ſtatute ib.

General coroners of counties, how and where eligible, and how to be ſworn ib.

How to be qualified ib.

Their office not determined by *king*'s demiſe ib.

Being elected by freeholders of county, if they be ſufficient, whole county ſhall anſwer ii. 55, 56

Some counties have more, ſome fewer; by ſtatute each county of *Wales* two, and *Cheſter* two ii. 56

If there be above two in a county, and a writ is directed *coronatoribus*,

tibus, tho one dies, whilſt plural number remains, a return by the coroner is good; but if only one ſurvive, he cannot execute and return it till another made ii. *Page* 56

But if two coroners in a county, or more, one may execute the writ, as in caſe of an *exigent*; but the return muſt be in the name of *coronatores* ib.

Coroners amoveable for cauſe, and new ones may be choſen by writ, tho cauſe not traverſable; yet if falſe, they may have a *ſuperſedeas* to the new writ ib.

Their power of proceeding to trial or judgment in pleas of the crown, or execution upon outlawry, taken away by *Magna Charta* ii. 56, 66

Of what they yet retain a juriſdiction ii. 57

Regularly have no power to take inquiſitions, but *de ſubito mortuis*, and ſome ſpecial incidents ii. 65

If one die of hunger, and vill bury him before coroner ſent for, it ſhall be amerced; *contra*, if of a fever or apoplexy ib.

If vill leaves a body, that died of a violent death, above ground unburied, it ſhall be amerced: ſuch amercements may be ſet on preſentment of grand inqueſt, or coroner ib.

If priſoner die in *king*'s bench priſon, clerk of the crown, who is coroner of that court, is to view the body ii. 58

Coroner muſt take inquiſition in perſon, or elſe it is void ib.

What inquiſition to contain ib.

If body buried before he come, what he ought to do in ſuch caſe, cannot take inquiſition, otherwiſe than *ſuper viſum corporis* ii. 58, 66

If he take inquiſition without view of the body, he may take ſecond inquiſition upon view of it; ſecond good, firſt void ii. 58, 59

But if firſt be taken on view, ſecond is void ii. *Page* 59

In default of coroner, who may inquire of a *felo de ſe*, or other ſudden death; juſtices of peace, or *oyer* and *terminer* may inquire thereof, and ſo may *B. R.* but then that preſentment is traverſable ib.

If conſtables make not a return of coroner's precept, or jurors appear not, conſtables or jurors in default, by whom amerced ib.

Jurors not challengeable by either party ib.

11 *H.* 4. *extends to theſe inquiſitions*; and if a juror be outlawed, tho but of treſpaſs, this a good plea to coroner's inqueſt of murder ii. 60

Of what matters jury charged to inquire ii. 60, 61

If one be killed by another, and it be certainly known that he killed him, it hath been held, that jury muſt hear evidence only for the *king*, and jury muſt find it murder, tho juſtifiable or excuſable *homicide*; but this practice neither warranted by law nor reaſon ib.

His inqueſt rather for his information of the truth of the fact, than for an accuſation ii. 61

Tho priſoner may be arraigned on coroner's inqueſt finding it murder or manſlaughter, yet bill of murder may be preferred to grand inqueſt, and thereon he may be arraigned and tried, tho coroner's inqueſt comes up only to manſlaughter, &c. ib.

Antient practice hath been for coroner's inqueſt to find the matter, as they judge it ib.

Difference of penning 1 & 2 *P. & M.* of examinations taken by juſtices of peace and coroner ib.

Whole evidence to be returned with inquiſition ib.

Several kinds of ſudden, violent deaths ii. 62

If

If inqueſt find he died *ex viſitatione Dei*, or *per infortunium*, what only to be done. ii. *Page* 62

In no caſe coroner ſets any fine or amercement, but only preſents it to next *gaol-delivery*, who impoſe it ib.

If inqueſt find one *felo de ſe*, what they are further to find and do ib.

Firſt finder of body to be bound over to next *gaol-delivery*. ii. 62, 63

If party ſlain and felon not known, inqueſt to find accordingly; what the antient manner of inquiry 63

If felon known, and inquiſition found him guilty, what were the proceedings ib.

One found guilty by coroner's inqueſt, or that he fled, they are to inquire of his goods and chattels; and antiently coroner was preſently to ſeiſe and inventory the goods, and deliver them to *villata*; how far altered by 1 *R.* 3. ib.

Coroner muſt commit perſons found guilty by inqueſt to ſheriff, who is to ſend them to gaol by ſtatute ii. 64

If any preſent found not guilty, what duty of coroner ib.

If parties found guilty as principals or acceſſaries *before* be not to be found, he might antiently have proceeded to have outlawed them ib.

That practice altered by ſtatute; juſtices of *gaol-delivery* are to proceed againſt offenders, if in gaol; if not, then to certify inquiſition in *B. R.* and thence proceſs of outlawry is to iſſue on that inquiſition ib.

By ſtatute coroner to take examinations againſt principals and acceſſaries *before*, and put them in writing, and bind over witneſſes to next *gaol-delivery*, and then to return their examinations, recognizances and inquiſitions ii. *Page* 64

One indicted on coroner's inqueſt is found not guilty, petit jury to inquire who killed the deceaſed, which ſerves as indictment againſt him; and if they cannot tell, they commonly give in ſome fictitious name ii. 65

If there be an inquiſition of murder or manſlaughter, and alſo indictment of ſame offenſe, and party is arraigned and acquitted on indictment; neceſſary to quaſh inquiſition, or arraign party upon it, who is to plead *auterfoits acquit*, or not guilty, and ſo be acquit on that alſo; otherwiſe he may be outlawed on record thereof ib.

But if both of ſame nature, and for ſame offenſe, and be good, he may be tried on both at once ib.

Where coroner is to have a fee, or not ib.

Hath power to take inquiſition of eſcape ii. 62, 65

Hath no power to take inquiſition of any other felony than death of a man and the incidents, except in *Northumberland* ii. 65, 66

Where he may take appeals of other matters ii. 66

In caſes not felony, what formerly he might have taken inquiſition of ib.

May take confeſſion of one that breaks priſon, and on his record party to be hanged ib.

Had power to attach one that had dangerouſly wounded another, and not only on appeal of *mayhem*, but *ex officio* ib.

What appeals coroner may take; they muſt be of facts within his county ii. 67

Appeal to be by bill in proper perſon, and before coroner and ſheriff ib.

Yet coroner principal judge, and *certiorari* may be to him alone, or

or to him and ſheriff; but not to ſheriff alone, neither for appeals nor outlawries, unleſs in *London* ii. *Page* 67
What coroner may do upon an appeal ib.
Whether he may outlaw defendant in appeal ib.
When appeal ſued before coroner and ſheriff, for determination it muſt be removed into *B. R.* ib.
Has power to take accuſation of approver ib.
He may on appeal by approver take his appeal againſt any one for any felony or treaſon in any county ii. 67, 68
If appeal in ſame county, coroner may make a precept to ſheriff to take appellee ii. 68
But if he be only coroner of a franchiſe, whether he may make precept to ſheriff to attach him ib.
Cannot make precept to bailiff of the franchiſe, becauſe he cannot execute proceſs within his franchiſe, but by ſheriff's mandate ib.
How that is to be remedied ib.
If appeal be of felony out of the county, it muſt be removed to juſtices of *gaol-delivery*, and they may make proceſs into any county to take appellee ib.

Vide Amercements, Arraignment, Felo de ſe, Forfeiture.

Corporation.

For forfeitures by corporations. Vide Forfeiture.

Vide Franchiſe.

Corruption and Reſtitution of Blood.

Corruption of blood effect of judgment in high, petit treaſon, or felony, except ſaved by ſtatute 354
Several ways of ſaving it *Page* 708
Tho there be a clauſe to ſave it, *king* to have forfeiture of lands during felon's life, and his goods; no eſcheat to the lord, where inheritance ſaved to the heir, it virtually makes heir inheritable, and wife dowable 703, 704
One attaint of piracy on 28 *H.* 8. no corruption of blood, unleſs indictment formed, as of a robbery at common law, and how to be for that purpoſe 354, 355. ii. 18
If one be attaint by courſe of civil law before admiral for treaſon or felony on the ſea, or conſtable and marſhal for treaſon, *&c.* beyond ſea, it works no corruption of blood 355. ii. 18
But attainder of treaſon or felony done on the ſea, on 28 *H.* 8. by jury, as well as attainder of foreign treaſon on 25 *H.* 8. corrupts the blood 355. ii. 17, 18
By *Weſtm.* 2. *de donis conditionalibus*, tenant in tail attaint of felony or treaſon, there is no corruption of blood as to the iſſue, ſave for their benefit 356
Son of donee in tail, attaint of treaſon *in vitâ patris* dies leaving iſſue, eſtate ſhall deſcend to grand child; *contra* of a fee-ſimple ib.
In all caſes but entails, attainder of treaſon or felony corrupts blood upward and downward 356
Father and two ſons; elder attaint dies *improles in vitâ patris*, younger ſhall inherit; *contra*, if elder ſurvive the father, except elder an *alien nee* 356, 357
One hath two ſons, and then is attaint, elder purchaſeth, and dies *ſine prole* in life, or after death of father, his attainder hinders not deſcent from brother to brother 357

Same law, if father was firſt attaint, and then had two ſons *Page* 357
Two brothers; elder is attaint, and hath iſſue, and dies in life of younger; younger dies *improles*, his lands in fee ſhall not deſcend to his nephew ib.
So if ſon of party attaint purchaſe land, and die without iſſue, it ſhall not deſcend to his uncle ib.
Judgment of *peine fort & dure* corrupts not the blood ii. 319
Tho a pardon reſtores not blood, yet as to iſſues born after, it is a reſtitution 358
But reſtitution in its true extent can only be by *parliament* ib.
Such *acts* conſtrued liberally ib.
Tho it be to reſtore *B.* only as heir to *A.* it reſtores alſo his lineal and collateral heirs ib.
Vide Forfeiture, Felony by Statute, Statutes in General.

Coverture.

A *feme covert* indicted of a miſdemeanor may be fined and impriſoned 20
But in aſſiſe, if ſhe vouch a record, and fail at the day, ſhe ſhall not be impriſoned ib.
Command of huſband exempts not wife in treaſon, murder or manſlaughter 45, 47, 434, 516
But if ſhe commit larciny or burglary with him, ſhe is to be acquitted 45, 516
Yet coercion is only preſumed till contrary appears ib.
Wife acceſſary *before* to a murder committed by huſband, not excuſed 47
Her aſſent to his treaſon makes them both principals ib.
Where he may be acceſſary to her, but not ſhe to him ib.
She cannot be acceſſary *after* with him to a felony, nor commit treaſon by receiving a traitor jointly with him, unleſs ſhe conſent to the treaſon 47, 48
She may be guilty of miſpriſion of treaſon of a ſtranger; but whether concealing her huſband's treaſon be miſpriſion *Page* 48
Baron and *feme* joint leſſees of a term, he kills himſelf, ſhe ſhall not hold it againſt *king* or *almoner* 413, 414

Council.

Who antiently were the *king's legal council* 421
Where priſoner allowed to have council. Vide Arraignment.

Counterfeiting Coin. Vide Coin.

Counterfeiting Great Seal, Privy Signet and Privy Seal. Vide Seal.

Counterfeiting Sign Manual. Vide Sign Manual.

County.

Where amerced in default of vill and hundred 448, 603
Where ſtroke in one county, and death in another, by ſtatute juſtices or coroner of county where party died, ſhall inquire and proceed 427. ii. 163
Appeal may be brought in either county 163
Goods ſtolen in one county, and carried into another, party indictable for larciny in foreign county, but not of robbery 507, ii. 163
Intire felony done in two counties diſpuniſhable, yet miſpriſion thereof puniſhable in either 651, 652, 653
Eſſential, that felony or treaſon be tried in proper county, except otherwiſe provided by ſtatute 158. ii. 163
33 *H.* 8. of trial of treaſon and murder in a foreign county, repealed as to the former, but in

force as to the latter *Page* 283. ii. 22, 163, 164
Whether receipt of felon, after attainder in ſame county, makes an acceſſary *ſans* notice 323, 622
By ſtatute acceſſary indictable and triable in county, where acceſſary 427, 623. ii. 163
Act making a felony, and ordering trial where party taken, without negative words, party may be indicted where offenſe done 94, 695, 705
Making a new felony of offenſe, conſiſting partly in the realm, partly out; where trial to be 706
By 35 *H.* 8. foreign treaſon, miſpriſions and concealments thereof, triable in *B. R.* by a jury of county, where court ſits, or before ſuch commiſſioners, and in ſuch ſhire as *K.* ſhall appoint, by a jury of ſuch ſhire 283, ii. 164
Peer of *Ireland* tried *here* by a *Middleſex* jury for a treaſon *there* 155
By 28 *H.* 8. treaſons, felonies, murders and confederacies committed on the ſea, or in a place where admiral hath juriſdiction, triable where *king* ſhall order 282. ii. 16, 17
Certain *acts* for trial of treaſons and miſpriſions thereof (committed in *Wales*) in the next *Engliſh* county, and where *king* ſhould appoint, repealed 282
What crimes committed in *Wales* juſtices of peace and *gaol-delivery* in *Engliſh* counties adjacent have cognizance of 157. ii. 38
Where ſpecial commiſſions of *oyer* and *terminer* may be limited to particular rivers extending into ſeveral counties; but then every county muſt have a particular ſeſſion *pro tanto* ii. 21
Where indictment taken before juſtices of *oyer* and *terminer* in proper county, may be determined by ſpecial commiſſion in a foreign county; but jury muſt be of proper county ii. *Page* 21, 22, 27
Where offender may be executed in a foreign county 502
In what county offender againſt 8 *H.* 6. making *avoiding records* felony, ſhall be tried 652
Offender againſt 3 *H.* 7. in taking away in one county, and marrying in another, where indictable 660
If a mortal ſtroke had [before 2 *G.* 2. been given at ſea, and party died in body of county, neither admiral nor common law had juriſdiction 426. ii. 19 to 21, 162
Treaſons by 37 *Eliz.* by prieſts, *&c.* coming into *England*, and felony for receiving them, indictable and triable where offender taken ii. 164
So is felony by ſtatute for taking a ſecond huſband or wife, the firſt living ib.
If one, by reaſon of tenure of lands in *com. B.* be bound to repair a bridge in *com. C.* he may be indicted in *com. C.* ib.
Foreign pleas by ſtatute triable by a jury of ſame county, where party indicted, except in treaſon ii. 239, 263
Where ſtroke in one county, and death in another, indictment to be where death was ii. 262
Where admiral hath juriſdiction *infra corpus com'*. Vide Admiralty.
For arreſts in proper or foreign counties. Vide Arreſt.

County Palatine.

Felony or treaſon committed in *Durham*, removeable in *B. R.* by *certiorari*; but on pleading *not guilty* remandable 158
They of *Durham* claim exemption from being ſworn out of precinct of that county palatine ib.
Of *treaſons* and *felonies* in *Tindal* and *Hexamſhire* ib.

By

By ſeveral *acts* outlawries of treaſon, *&c.* in *Lancaſhire*, cauſed not a diſability of the parties, but are repealed by 33 *H.* 6. *Page* 286

How indictors in *Lancaſhire* to be qualified, where indictment ſuppoſes party inhabiting out of it, or where indictment is taken out of it againſt perſons reſiding there 286. ii. 152*

All powers in county palatine and franchiſes for making juſtices of aſſiſe, gaol-delivery, or peace, reſumed by 27 *H.* 8. 286. ii. 38, 211, 212

Under what ſeals the commiſſions now paſs 286

Proceſſes to be in *king*'s name, under whoſe *teſte* ib.

Indictments to conclude *contra pacem regis* ib.

All proceſſes of outlawry, attainder, *&c.* in county palatines, now of ſame effect, and induce ſame forfeitures, as if offenſe done, tried and determined in any other *Engliſh* county ib.

Royal forfeitures of treaſon not touched by 27 *H.* 8. ib.

Juſtices ſitting within exempt franchiſes or counties palatine, now *king*'s courts and his juſtices ii. 38

Certiorari iſſuing out of *B. R.* to be obeyed by juſtices ſitting in *Durham*, or within *cinque ports* ii. 38, 211, 212

They ſhall hold their ſeſſion *within ſuch liberties, and not elſewhere* ib.

None within ſuch liberties compellible to appear out of ſame before other juſtices ib.

Where ſuch franchiſes were antiently granted to abbots, there is a ſpecial commiſſion of *gaol-delivery* for that franchiſe ib.

Reſtriction of *ſitting within franchiſe* extends not to commiſſion of *oyer* and *terminer* ii. 38, 39

This reſumption extends not to cities and boroughs ii. 39

Vide *Franchiſe*, *Certiorari*.

Court.

In dubiis rather to incline to acquittal than conviction. *Page* 300, 509

Not bound to take notice at another *ſeſſions* that a man is attaint 545

Ought not to be tranſported with heinouſneſs of offenſe 87, 636

Of the court before lord high ſteward for trial of peers ii. 7

Amply treated by lord *Coke* ib.

Expoſition on 33 *H.* 8. for trial of *treaſons* and *felonies* within *king*'s palace before ſteward of houſehold, and on ſubſequent *acts* derogating from it ii. 8, 9

Of commiſſions of *oyer* and *terminer* for the verge, the extent and manner of trial of felonies within ſame ii. 10, 11

Can only proceed on indictments taken before themſelves, and not on coroner's inqueſts, and therefore have in ſame commiſſion one of *gaol-delivery* ii. 11

Where ſuch commiſſion determined by general commiſſion of *oyer* and *terminer* in ſame county with notice, and where this ſpecial commiſſion determines the general *pro tanto* of county, as within verge ib.

Commiſſions for verge diſuſed ii. 11, 12

If penalty be recoverable in any of *king*'s courts of record, *act* extends only to the four *ſuperior courts* ii. 29

Where the words, *no wager of law, eſſoin, protection*, &c. *ſhall be allowed*, tie up juriſdiction to courts, that can allow protection, *&c.* ii. 30

Where penalty made recoverable by original writ, it is reſtrained to ſuperior courts, tho many contrary inſtances ib.

Where one attaint is brought into another court, execution not to be awarded againſt him, till demanded what he can ſay againſt it 368

By 3 *H.* 7. imagining and conſpiring to kill the *king*, or any of his council is made felony; who the only judges, and by whom preſentment and trial muſt be *Page* 663
All courts, having judicial power by common law, or ſtatute, have power to grant warrants for arreſting felons, but ſuch as are ſimply miniſterial, and have no juriſdiction, as conſtables, cannot iſſue warrants ii. 105
Cuſtom of the court of *B. R.* part of the law of the land ib.

Vide Admiralty, Certiorari, Commiſſion, Gaol-delivery, Juſtices of Aſſiſe, of Peace, King's Bench, Oyer and Terminer.

Day and Night.

DAY and Night defined 550, 551
Crepuſculum explained 550

Deer.

Where it is lawful to ſhoot them 40

Demiſe of the King. Vide Commiſſion, King.

Demurrer. Vide Pleas.

Deodand.

Deſcribed; how applied 419
Not forfeit till death found; cannot be claimed by preſcription, and why ib.
On death by miſadventure, what inqueſt to inquire of ib.
Villata, chargeable with proceſs for *deodands* or *value*, tho not delivered to them ib.
Sword, &c. of a ſtranger forfeit ib.
Diſtinction between *deodands moventia ad mortem & quieſcentia* *Page* 420, 421
What moveable things ſhall be *deodands*, or not ib.
What things not moveable 422
Where there ſhall be *deodand*, where party ſlain is within age of diſcretion, or not ib.
Where a ſhip, &c. ſhall be a *deodand*, or not 422, 423, 424

Diſcontinuance.

Indictment not diſcontinued by *king*'s death, tho in ſome caſes proceſs be ii. 189, 209
Where priſoner hath pleaded *not guilty*, and then makes default, whereon *exigent* is awarded, firſt iſſue is diſcontinued ii. 224, 225

Domus Manſionalis. Vide Burglary.

Dower. Vide Forfeiture.

Drunkenneſs.

Where it excuſeth or not 32

Dureſs. Vide Neceſſity.

Engleſhery.

EXPLAINED 447, 448

Error.

Erroneous judgment in treaſon given by one that had authority, was at common law reverſible by writ of error 353
By 29 *Eliz.* ſecures all former attainders, where party executed, from ſuch reverſal, but meddles not with other attainders ib.
Neither doth 33 *H.* 8. take away writs of error on attainder of treaſon ib.

26 *H.* 8. & 5 & 6 *E.* 6. take away from one outlawed in treaſon reverſal of outlawry, becauſe party out of the realm, but extends not to other offenſes *Page* 354
Miſnomer in civil action not error ii. 175
But outlawry of one indicted without addition, or by a falſe one, erronious ii. 176
Writ of error, a *ſuperſedeas* to the iſſuing execution from delivery of writ till day of return paſt; but if plaintiff proceed not to removal of record, execution ſhall be granted for his delay ii. 213
Where *auterfoits acquit* aſſignable for error, as well as pleadable ii. 221, 243, 251
One outlawed on alledging error in law or fact to ſatisfaction of *B. R.* ſhall have a reſpite of execution to purchaſe writ of error, and be remitted to marſhal in mean time ii. 408
Amicus curiæ may inform *B. R.* of any error in the outlawry ib.

Vide Outlawry.

Eſcape.

One mortally wounded, offender in cuſtody of conſtable, who ſuffers him to eſcape before death of party; no felony in conſtable, tho he dies within the year 427, 591
One eſcaping is ſuppoſed always in cuſtody 581
Gaoler voluntarily ſuffering a traitor to eſcape, treaſon 234
Wilful eſcape by gaoler, no felony, if *mittimus* not in writing under ſeal; but *contra*, where commitment by court of record 583, 584
Nor is it felony, except cauſe expreſſed in *mittimus*, or offenſe be notified to gaoler 578, 584, 595, 596, 610
An unapt concluſion of *mittimus* excuſeth not gaoler from felony *Page* 595
The ſeveral ſorts of eſcape 590
Voluntary eſcape defined 590, 591
It becomes ſame crime, as party was committed for, *viz.* treaſon or felony ib.
It is felony, tho party be not convict or attaint, but till then gaoler ſhall not be arraigned, tho he may be indicted 591, 598. ii. 254
Felony committed, conſtable takes one on ſuſpicion, and voluntarily lets him go at large, it is felony, tho party not indicted 592
Tho officer after arreſt be aſſured of party's innocence, he may not ſafely diſcharge him, but bring him before a juſtice ib.
He diſcharges him at his peril, if felony committed, and party guilty ib.
A convict of petit larciny ſuffered to eſcape, no felony ib.
The ſame law of eſcape of one committed for, or convict of homicide *ſe defendendo* ib.
But if commitment or indictment be for *manſlaughter*, tho in truth but *ſe defendendo*; yet *primâ facie* eſcape indictable as felony, tho *in eventu* otherwiſe ib.
One indicted of murder is pardoned or acquitted within the year, but left in gaol till year elapſed, on 3 *H.* 7. and within year, gaoler ſuffer him to eſcape, it is felony *primâ facie*, for poſſibility of appeal; but if not brought within the year, or party be acquitted thereon, gaoler to be acquitted 593
Eſcape before clergy allowed; felony; but party retaken, and clergy had, felony purged ib.
Clergy had, and priſoner continued for further correction by 18 *Eliz.* eſcape fineable ib.
If *A.* commit a felony before *B.* who neither takes him, nor attempts it, not felony in *B.* 594

If *A.* commit a felony, and *B.* knowing it receive him, and then ſuffer him to depart, no eſcape by *B.* *Page* 594
Gaoler refuſing to receive a felon from conſtable, conſtable lets him go, it is an eſcape ib.
Private man, on delivering felon to conſtable or vill, is diſcharged; ſo are conſtable and vill on delivering him over to ſheriff, or his gaoler 594, 595
Cuſtody of felon belongs to old ſheriff till turned over by indenture ib.
A private man knowing *B.* to have committed a felony arreſts him, and wilfully ſuffers him to eſcape, felony; or a felony being done, he arreſts *B.* on ſuſpicion, and then lets him eſcape, felony *in eventu* 595
If *mittimus* contain no cauſe, gaoler not bound to receive felon ib.
A private man carrying felon to the common gaol, acquaints gaoler by word only that it is for felony, gaoler chargeable on eſcape. 596
Conſtable wilfully ſuffering felon to eſcape from the ſtocks, felony ib.
Priſoner reſcued, gaoler diſpuniſhable ib.
Where in caſe of fire, enemies or rebels eſcape by gaoler, is excuſable ib.
Admitting bail, where it ought not, where a negligent eſcape, where wilful 596, 597
If gaoler voluntarily licence felon to wander out and return, if he return before gaoler indicted, it is a miſdemeanor; but whether a voluntary eſcape 597
Sheriff fineable for wilful or negligent eſcape by his gaoler 597, 598
But not for eſcapes by gaolers in particular franchiſes; theſe concern themſelves and their lords only 598
Officer permitting eſcape, *quaſi* acceſſary *Page* 598
If principal be found not guilty, or guilty of a fact not capital, or be only convict and not attaint, and hath his clergy, gaoler ſhall be diſcharged of felony, but fined 598. 599. ii. 254
Voluntary eſcape within clergy, tho principal felony not 599
Eſcape makes but one felony, tho principal offender indicted of ſeveral ib.
But if two be indicted of one felony, and eſcape, gaoler indicted ſeverally for both ib.
If offenſe, for which party was committed, appear not by matter of record, neceſſary a felony be done, or elſe eſcape no felony; but *contra*, where it appears by a record ib.
If it appear by record, how indictment to be, and how, if otherwiſe ib.
Calling record of priſoners over as in *B. R.* ſufficient to convict of a negligent eſcape, but not voluntary, except gaoler confeſs 599, 603
By whom country to be amerced for an eſcape 600
Diviſion of negligent eſcapes ib.
Negligent eſcape fineable, what the meaſure of the fine 600, 602, 604
What ſhall be ſaid a negligent eſcape 601
If priſoner break gaol, it is a negligent eſcape ib.
Where lawful to fetter priſoners ib.
If private man arreſt a felon, who eſcapes by force, without his default, he is excuſed ib.
Officer bringing priſoner to gaol, priſoner reſcueth himſelf, how far officer excuſed 601, 602
If felon in carrying to execution be reſcued, ſheriff puniſhable 602
Gaoler may take priſoner ſeven years after, tho out of his view, but

but that excuſeth not negligent eſcape *Page* 602
Having once loſt view, it is an eſcape, tho taken after; but if gaoler take him on freſh purſuit, and hath ſtill the view, no eſcape ib.
Gaoler fined for negligent eſcape may retake felon, but fine not diſcharged ib.
What a proper conviction of a negligent eſcape 603
Sometimes coroner's roll ib.
Preſentment by grand inqueſt not ſufficient, becauſe officer finable ib.
Preſentable in a leet, but they cannot ſet a common fine or amercement; but it may be removed in *B. R.* where amercement may be ſet ib.
Executors fined for negligent eſcape in their teſtator 604
Eſcapium, and the franchiſe to be quit thereof, explained 604
Coroner hath power to take inquiſition of eſcape ii. 62, 65
If private man diſcharge one ſuſpected, whom he hath arreſted, without bringing him to juſtice or conſtable, it is an eſcape ii. 81
If felon not once in the hands of the officer that hath warrant to arreſt, no eſcape; but yet it may be an eſcape in townſhip, for which they ſhall be amerced ii. 93
Vide Amercement, breaking Priſon, Evidence, Indictment, Reſcue.

Eſtoppel.

Where defendant is indicted, and pleads to indictment by a wrong name, that eſtoppel ſhall avail ſheriff or officer, that doth execution ii. 175
So in a civil action, if defendant appear by wrong name, ſheriff in falſe impriſonment ſhall have like advantage ib.

Evidence.

How coin proved current *Page* 196, 197, 204, 212, 213
How foreign coin proved legitimate 197, 198, 213, 310, 316
Intention how to be proved 229
Where by 1 & 2 *P. & M.* Informations taken before juſtices of peace may be read in evidence againſt a priſoner 305, 306, 586. ii. 284, 285
Whether, if informant was bound over, and appear not, they may be read 305
Whether juſtices of peace of a foreign county may tranſmit ſuch informations before juſtices of *gaol-delivery* of proper county 305, 306. ii. 285
As to examination of priſoner, it muſt be teſtified, that it was without menace or undue terror ii. 285
Depoſitions taken in a cauſe of divorce, offered to prove force on indictment for forcible marriage, rejected, and why 306. ii. 285
Hear-ſay no evidence, but from offender himſelf ib.
In murder *A.* indicted, as having given the mortal ſtroke, *B.* and *C.* as preſent and aſſiſting, if proved that *B.* gave the mortal ſtroke, and *A.* and *C.* were preſent and aſſiſting, it maintains indictment, and all ouſted of clergy; but *contra*, on indictment on 1 *Jac.* of ſtabbing; for he, that gave the ſtroke, ſhall have his clergy on ſuch indictment 437, 463. ii. 185, 292, 344, 345
Whence evidence of malice muſt ariſe to conſtitute murder 451, 452
Where malice in law maintains indictment of murder 460. ii. 292
What circumſtances are evidence of a *felonious intent* on indictment of larciny 508, 509
Thieves come to rob *A.* and force him by *menace* of death to go and

and feteh them money, which he doth, it maintains a general indictment of robbery *Page* 532, 533

In indictment of robbery *violenter* muſt be both alledged and proved 534

What evidence to maintain indictment for a *felonious eſcape, breach of priſon, or reſcue* 599

Raviſher, having kept the woman as a concubine before the ſuppoſed *rape*, evidence of aſſent 628, 629

What concomitant circumſtances neceſſary evidence of a *rape* 633 to 636

On indictment of *ſecond forgery* to make it felony, record of firſt conviction by *judgment* muſt be proved 686

If alledged, that party was killed with a ſword, and proved that he was killed with another weapon, indictment maintained; but *contra*, if by another kind of death, as ſtrangling, *&c.* ii. 185

Whether an information taken in treaſon can be read in evidence on indictment of treaſon ii. 286

By 21 *Jac.* mother of baſtard-child concealing its death, ſhall ſuffer as in murder, unleſs ſhe prove by one witneſs, that child was born dead ii. 288

Indictment need not alledge, but it muſt be proved on evidence that ſhe concealed it, if advantage be taken of this ſtatute ii. 289

If no concealment proved, left to jury to inquire by circumſtances, whether ſhe murdered it or not; but it doth not put her under an abſolute neceſſity of proving it born alive by one witneſs; ſo evidence ſtands but as at common law ib.

If on view of child it be teſtified by one witneſs from probable circumſtances, that child was not come to its *debitum partûs tempus*, this is proof by one witneſs, that child was born dead, ſo as to leave it to the jury, as upon a common law evidence, whether ſhe was guilty of death, or not; what ſuch circumſtances are ii. *Page* 289

In ſome caſes preſumptive evidences go far to prove party guilty, but better five guilty perſons eſcape unpuniſhed, than one innocent man die ib.

Cautions againſt convicting on doubtful evidence, with inſtances of innocent perſons having ſuffered thereby 300, 509. ii. 289, 290

Not fit to convict any man for ſtealing goods *cujuſdam ignoti*, merely becauſe he cannot give an account how he came by them, unleſs due proof made, that a felony was committed of thoſe goods ii. 290

Nor to convict any one of murder or manſlaughter, unleſs fact proved to be done, or body found dead ib.

Variance between indictment and evidence in *county* material, but not in *vill* ii. 291

If evidence in caſe of murder differ from indictment *in ſpecie mortis*, it doth not maintain indictment; as if indictment be for killing by poiſon, and evidence be of killing by ſtabbing; but *contra*, if indictment vary in ſpecies of the poiſon, or indictment be for killing with a ſword, and evidence be of killing with a ſtaff or gun; effectual word in both *percuſſit* ib.

And ſame law with reſpect to acceſſaries to ſuch principals ii. 292

If *A.* and *B.* be indicted as principal, and *C.* as acceſſary *after* to both, *A.* and *B.* are convict, or only *A.* is convict, and on the evidence againſt *C.* it appears he was only acceſſary to *A.* it maintains indictment ib.

One indicted on 1 *Jac.* againſt ſtabbing, if it appears on evidence,

dence, that perſon killed ſtruck firſt; yet good evidence to convict party indicted of manſlaughter ii. *Page* 292

If one be indicted of petit treaſon for killing his Maſter, tho he were not ſuch, he may be found guilty of murder, and tho not *ex malitiâ præcogitatâ*, he may be found guilty of manſlaughter, and *not guilty* as to the petit treaſon ib.

If one be indicted of burglary, and *quod felonicè & burglariter cepit bona, &c.* he may be acquit of the burglary, and found guilty of ſimple felony, if evidence riſeth no higher ii. 293

If one be indicted of murder *ex malitiâ præcogitatâ*, evidence proving killing on a ſudden falling out, is good to find him guilty of manſlaughter ib.

What evidence the jury ſhall have out with them or not. Vide Jury.

Vide Indictment, Verdict, Witneſs.

Examination. Vide Confeſſion, Evidence, Juſtice of Peace.

Execution and Reprieve.

Where one attaint is brought into another court, or reprieved to another ſeſſions, execution not to be awarded, till firſt demanded, what he can ſay againſt it 368

Execution of drawing to be on a hurdle 382

Antiently without any thing under ib.

A ſtranger of his own head executes a criminal, murder 501

Execution muſt purſue judgment, otherwiſe murder 501. ii. 411

Who are the ordinary miniſters in execution of malefactors 501. ii. 409, 410

What warrant iſſued out by *lord high ſteward* for execution of a peer 501. ii. 409

How many commiſſioners of *oyer* and *terminer* formerly ſigned warrant, where they gave ſentence *Page* 501. ii. 409

Leaving a calendar with ſheriff, the only warrant now ii. 409

No warrant under ſeal of juſtices of *gaol-delivery* for execution, but only a calendar 501. ii. 409

What warrant for execution was antiently iſſued, or awarded by them ii. 409

J. Rolle would never ſubſcribe calendar, but after judgment command ſheriff in court to do execution, and for not doing it fined a ſheriff 2000l. 501. ii. 31, 410

A priſoner removed in *B. R.* by *habeas corpus*, or taken on indictment of felony in *Middleſex* is committed to the marſhal, arraigned and adjudged to die; court may ſend him to *Newgate*, and command ſheriff to do execution 502

But if remitted to the marſhal, (as regularly he ought) then marſhal is proper officer, and may execute party in *Middleſex*, wherever offenſe committed; and court may *ore tenus*, or by order command ſheriff to aſſiſt 464, 502. ii. 5

How entry to be for marſhal to do execution 464, 502. ii. 409, 411

They that give judgment may award execution ii. 406

Therefore *B. R.* on removal of priſoner and record, may give judgment, and award execution ii. 406, 407

B. R. never gives judgment againſt any, not *in cuſtodia mareſcalli* ib.

How warrant for execution to lieutenant of the tower to be ii. 410

Sheriffs of *London* and *Middleſex* to be aſſiſting ib.

If party revive after being cut down, he muſt be hanged again ii. 412

Judge

Judge hath power to reprieve, *before* or *after* judgment, infant convict of capital offenſe in order to *king*'s pardon *Page* 19
Of Reprieves *ex arbitrio regis*; how the *king* may command a reprieve 368. ii. 412
Ex arbitrio judicis; judge may reprieve one *attaint* of treaſon before him, but ought to be cautious in doing it ib.
After he hath granted it, may command execution after ſeſſions and adjournment of commiſſion 368. ii. 412, 413
Reaſons for a reprieve ii. 412
Of reprieves that are *quaſi de jure*, or *neceſſitate legis* ii. 368, 413
In reſpect of pregnancy; duty of judge, before he finiſhes his ſeſſions to demand of every woman *attaint* of *treaſon* or *felony*, what ſhe has to ſay againſt execution ib.
What incidents to a plea of pregnancy *in retardationem executionis* ib.
Enſeinture with quick child being found, execution to be reſpited till another ſeſſions, but no ſtay of execution, except woman with quick child 368, 369
If ſhe once hath had benefit of this reprieve, and be delivered, and afterwards be with quick child again, ſhe ſhall not have a further reſpite 369
If jury of women find her quick, whereas ſhe was not at all with child, if next ſeſſions happen, ſo as to render it impoſſible, that ſhe could be with child, but muſt be delivered *meſne* between former ſeſſions and this, ſhe ſhall be executed, otherwiſe not ib.
Such juries prone to favor the women ii. 413
If ſhe were not quick with child, when ſuch verdict given, nay, tho not then with child at all, but became quick before ſecond ſeſſions, ſhe ſhall have a ſecond reprieve *in favorem prolis* 369
But gaoler puniſhable in the latter caſe. ii. *Page* 413
When the *fœtus* ſhall be ſaid to be quick ib.
In all caſes of reprieves for pregnancy, judge to make a new demand, what priſoner has to ſay againſt execution; after delivery ſhe muſt be brought to the bar again for that purpoſe, which muſt be at the following ſeſſions 369, 370. ii. 413, 414
Reprieves ought to be matter of record, and tho ſhe be delivered before next ſeſſions, ſheriff not to make execution ii. 413
Nor ought judge to give ſuch direction ib.
If *meſne* between judgment and award of execution, offender becomes *non compos*, a jury ſhall be ſworn to inquire *ex officio*, whether counterfeit or not 35, 370
What parts of execution for treaſon may be abated by *king*'s warrant under great or privy ſeal, &c. 370. ii. 412
If jury convict againſt or without evidence, and againſt direction of court, court may reprieve the convict before judgment, and and certify the *king* for his pardon ii. 309, 310
In what caſes priſoner not to have execution awarded, till he be demanded what he can ſay againſt it ii. 407, 408
Where one outlawed ſhall have a reſpite of execution, till he can purchaſe a writ of error ii. 408
Where clergy may be allowed under gallows to one wrongfully attaint, if judge come that way ii. 379
This may be done by judges of *B. R.* as juſtices of peace; but *quære*, whether by juſtices of *oyer* and *terminer* after their ſeſſion ended ib.

Vide Judgments.

Executors.

Term for years not extinguiſhed by acceſſion to an executor, who hath the fee, becauſe *en autre droit* *Page* 250
Fined for negligent eſcape in their teſtator 604

Exigent. Vide Outlawry, Proceſs.

Falſifying Attainders.

WHERE alienee may not only falſify attainder, in point of time of treaſon or felony, but alſo offenſe itſelf 361
Not concluded by confeſſion of alienor ib.
Purchaſer *meſne* between time of felony committed and attainder by verdict cannot falſify in point of offenſe, but time ib.

Fealty. Vide Alligeance.

Fear. Vide Neceſſity. 427

Felo de ſe.

Muſt be of age of diſcretion, and *compos mentis* at time of giving the mortal ſtroke 411, 412
What ſhall be ſaid age of *diſcretion*. Vide Infant.
For *non compos mentis*. Vide Ideot.
Why inquiſition runs *felonicè* 411, 412
Death muſt enſue within year and day after ſtroke 412
Lunatick killing himſelf in a fit of lunacy cannot be a *felo de ſe*; *contra*, during a lucid interval 31, 412
There muſt be an intent to commit the fact 412
What ſhall be ſaid a voluntary killing 412, 413, 480, 481, 493
Villain gives himſelf a mortal ſtroke, lord ſeiſeth goods, *king* ſhall have them 414
He forfeits his goods and chattels, but not his lands, nor wife's dower *Page* 414
Baron and *feme* joint leſſees of a term, he kills himſelf, ſhe ſhall not hold it againſt *king* or *almoner* 413, 414
How the forfeiture ſhall relate ib.
There muſt be an inquiſition to intitle the *king*; if the body cannot be ſeen, conviction to be before juſtices of *oyer* and *terminer*, or *peace*, and then traverſable; but if it can be ſeen, then before coroner *ſuper viſum corporis*, and whether traverſable 414 to 418
Where inquiſition *ſuper viſum corporis* quaſhed, and coroner ordered to inquire *de novo* 415
Where party found to have died *per infortunium*, and ſuggeſted on part of *king* or almoner, that he was *felo de ſe*, writ of *melius inquirendum* denied; if granted, would have been void ib.
What default of coroner's inquiſition ſhall be ſupplied by this writ ib.
Proceſs may be made againſt thoſe who detain the goods in the inquiſition 416
Vide Coroner, Deodand.

Felony by Common Law.

Open reſiſtance of juſtices of *oyer* and *terminer*, felony 146
Every felony includes miſpriſion, and offender may be indicted of the latter only 652, 708
Vide Arſon, Breach of Priſon, Burglary, Eſcape, Felo de ſe, Homicide, Larciny, Murder and Manſlaughter, Reſcue, Robbery.

Felony by Statute.

Weſtm. 2. *de uxore abductâ ſive raptâ cum bonis viri*, makes it felony 637

Ex-

Expoſition thereon *Page* 637 to 640
Wife voluntarily going away with a ſtranger, and taking huſband's goods, felony in neither; but treſpaſs in the ſtranger 637
Judgment of death antiently given in a civil action brought on this *act*, but diſuſed 638
If defendant convicted in this action, it antiently ſerved for indictment ii. 150*
Articuli ſuper cartas make *purveyors* felons in certain caſes 639, 640
But purveyance now taken away 640
14 *E.* 3. makes it *felony in gaoler by dureſs of impriſonment to make one become approver againſt his will*, clergy allowed 640, 641
But extends not to a gaoler *de facto* 641
18 *H.* 6. makes *exportation of wool and woolfells other than to the ſtaple of* Calais *or ſtreights of* Morocco, felony; clergy allowed; *quære* whether in force 642, 653
37 *E.* 3. makes *ſtealing falcons*, &c. felony, what proof required; within clergy 642
5 *H.* 4. *c.* 4. *multiplication of gold and ſilver*, clergy allowed 644
——*Cap.* 5. *malicious cutting out tongue, or putting out eyes*, clergy allowed 645
3 *H.* 5. *coining or bringing in gally-halfpence, ſuſkins or dodkins* ib
2 *H.* 6. *Payment or receipt of blanks*, clergy allowed; now diſuſed ib
3 *H.* 6. *Congregation of maſons to prevent ſtatutes of labourers*, but acts relating thereto repealed ib
33 *H.* 6. *Servants after maſter's deceaſe, taking and ſpoiling his goods*, clergy allowed 653
Wherein extended beyond the letter 654
1 *H.* 7. *Hunting with vizors, and reſcuing ſuch hunters*; expoſition thereon 656 to 659
3 *H.* 7. *Imagining and conſpiring to kill the* king, *or any of his council*, clergy allowed 661 to 664
Who a felon for conſpiring the death of any, and what great perſons within this *act*; who the only judges, by whom preſentment and trial, and where trial to be *Page* 663
1 *E.* 6. repealed all new felonies enacted *tempore H.* 8. & 1 *M.* repealed the ſame, and the new created felonies *tempore E.* 6. 308, 309, 664
But neither extended to piracy, or any *act*, which did not conſtitute a *new* felony, but only directed proceedings in old felonies with reſpect to clergy, trial, &c. 308, 309, 664, 665
A diviſion of ſtatutes of *H.* 8. & *E.* 6. *conſtitutive* of new felonies 665
Which of theſe never after revived or re-enacted ib
Which repealed, but re-enacted with or without alterations ib
Some offenſes made felonies before *H.* 8. but extended farther by *acts* in his time, and then *old* felonies ſtand, but additional repealed by 1 *E.* 6. & 1 *M.* ib
21 *H.* 8. *Servants embezzling goods delivered to them*; 27 *H.* 8. ouſting clergy, being repealed by 1 *E.* 6. clergy allowed [how far ouſted by 12 *Ann.*] 666, 667
This *act*, but not 27 *H.* 8. revived by 5 *Eliz.* 667
22 *H.* 8. 2 & 3 *P.* & *M. Cutting powdike*, clergy allowed 669
1 & 2 *P.* & *M.* Egyptians *above fourteen remaining here a month*, 5 *Eliz.* ouſts clergy 670, 671
18 *H.* 6. *Soldiers retained, as preſcribed by the act, departing from their captains without licence* 671 672
2 *E.* 6. *ad idem* 674, 675
Expoſition on the ſeveral *acts* making departure of *ſoldiers, mariners* and *gunners ſans* licence, felony 671 to 681
A mariner or gunner, who hath taken *preſt*, and departs *ſans* licence, hath clergy 678, 679
Where a ſoldier departing without licence ſhall have his clergy, or not

not Page 677 to 681
A diviſion of *acts tempore Eliz.* making new felonies 681, 682
8 *Eliz. Sending ſheep beyond ſea after former conviction*, clergy allowed 687
27 *Eliz. Receiving, retaining, or maintaining a popiſh prieſt knowingly*; no clergy 336, 614, 615, 688
31 *Eliz. Imbezzling* king's *armour*; within clergy ib
Expoſition thereon ib
35 *Eliz. cap.* 1. *A recuſant refuſing to abjure, or after abjuration to depart*, without clergy ib
Expoſition on this *act* 688 to 690
Circumſtances neceſſary to be alledged and proved 689, 690
—— *Cap.* 2. *A popiſh recuſant refuſing to abjure, or after abjuration to depart*; without clergy 690
39 *Eliz.* 1 *Jac. Dangerous rogue baniſhed, or adjudged to the gallies, returning* ſans *licence*, within clergy 691
But *branded rogue begging or wandering*, ouſted of clergy ib
39 *Eliz. Wandering ſoldiers or mariners, or idle perſons wandering as ſuch*; felony in certain caſes, no clergy 691, 692
1 *Jac.* cap. 1. Witchcraft; no clergy 694, 695
—— Cap. 4. *Subjects paſſing ſea to ſerve foreign prince, without taking oath directed*: clergy allowed 696
—— Cap. 21. *Of murder of baſtard children.* Vide Evidence, Indictment.
—— Cap. 26. *Acknowledging fine, recovery, deed inrolled, ſtatute, or recogniſance, bail, or judgment in name of another not privy to ſame*; clergy ouſted, but no corruption of blood or loſs of dower ib
Bail taken, but not filed not within this *act* [but ſince made felony] ib
—— Cap. 31. *Going with plague ſore*, but diſcontinued 695, 696
Statutes enacting felonies continued down from the time the author wrote till this time Page 697 to 703

Vide Breaking Priſon, Buggery, Burglary. Forcible Marriage, Forgery, Polygamy, Rape, Record, Statutes in general, &c.

Fine.

All *acts* ſpeaking of fines or ranſoms at *king*'s pleaſure, mean of *king*'s Juſtices 375
Preſentment of a negligent eſcape by grand inqueſt not ſufficient to convict officer, becauſe he muſt be fined; but ſufficient for an amercement of a vill 603
Where executors were fined for a negligent eſcape in *their teſtator* 604
What the meaſure of a fine for a negligent eſcape ib
Where a prohibitory *act* makes a penalty recoverable by action of debt, but mentions not indictment, party may be indicted, but fine not to exceed penalty ii. 171

Force. Vide Neceſſity.

Forcible Entry.

If one be indicted for a riotous and forcible entry *contra formam ſtat.* and the ſtatute is miſrecited; indictment quaſhed ii. 171, 172
Juſtices by *ſtatute* may make reſtitution on indictment found at private ſeſſions before any quarter-ſeſſions happen ii. 213
For removal of indictment of forcible entry by certiorari. Vide Certiorari.

Forcible Detainer.

If one hath been in poſſeſſion of a houſe for three years, he may detain it by force, by 8 *H.* 6. 445

Forcible Marriage.

By 3 *H.* 7. *Taking a woman againſt her will and marrying her*, made felony *Page* 614, 659
Expoſition on this *act* 614, 659 to 662
Acceſſaries *before* and receivers principals 614, 661
To what women it extends or not 660
Taking away in one county and marrying in another, where offender indictable ib
Marriage with conſent excuſeth not, if firſt taken away againſt her will ib
She may be a witneſs, tho a wife *de facto* 301, 302, 660, 661
Principals and acceſſaries *before* ouſted of clergy 661
Whether receivers of ſuch women be ouſted of clergy 614, 661

Forfeiture.

Forfeiture of goods for treaſon ſame as for felony; but ſome difference as to grants of goods ſo forfeited 239
Forfeiture of lands for treaſon 239 to 259, 356
At common law lands intailed forfeited for treaſon, and ſo by 26 *H.* 8. & 33 *H.* 8. now in force 241
In the caſe of grandfather, father and ſon, grandfather is tenant in tail, father attaint of treaſon dies firſt, the lands ſhall deſcend to the grandchild; father could forfeit nothing, and 26 *H.* 8. corrupts not the blood by attainder of the father ib
If after 26 *H.* 8. and before 33 *H.* 8. which veſts all in the *king* without office, tenant in tail had been attainted of treaſon, and had died in that interval, the lands would have deſcended to the ſon till office found; but *contra* in caſe of tenant in fee-ſimple attainted, and dying before office; in this caſe freehold is caſt on *king* without office, and none can take it elſe *Page* 242
King at common law and by 26 *H.* 8. was intitled to a right of entry, where party was in merely by diſſeiſin or abatement, but not to a right of entry, where poſſeſſor was in by title; but by 33 *H.* 8. *king* is intitled to right of entry in both caſes, and that without office; but there muſt be inquiſition or ſeiſure to bring *king* into actual poſſeſſion ib
If *king* grant over before ſuch ſeiſure, how grant is to be, or elſe void ib
One committing treaſon hath then a bare right of action touching lands, or a right to reverſe judgment given againſt him, or to bring a formedon or writ of entry, but hath no right of entry without recovery in ſuch action; this right neither by common law, nor 33 *H.* 8. is given to the *king* by attainder of treaſon; *ſed quære* ib
Tenant in tail of the gift of *H.* 7. reverſion in the crown, made a feoffment in fee, and then was attaint of treaſon, and died, leaving iſſue; the feoffor againſt his own feoffment could not claim any right at time of the treaſon, yet there remained in him a right of intail forfeited to the *king*; and *king* is in as of his reverſion, which is not ſubject to leaſes duly made by tenant in tail before his attainder 242, 243
Tenant in tail general makes a feoffment to the uſe of himſelf in fee, and before 26 or 27 *H.* 8. commits treaſon, and is attaint, and dies, leaving iſſue inheritable to the intail, then a ſpecial *act* is made, whereby he was to forfeit all eſtates and rights; tenant in tail can have no right againſt his own feoffment; but when eſtate returns to him, that is forfeited by the attainder;

attainder; and *king* ſhall hold this eſtate diſcharged of the right of old intail, and that ſhall never revive to the iſſue; retroſpect of *king*'s title by attainder ſhall over-reach and avoid the *remitter* wrought in the iſſue before *king*'s actual ſeiſin by the attainder, or office thereon *Page* 243

King makes a gift in tail, ſaving reverſion to himſelf, attainder of treaſon of tenant in tail barred not his iſſue, becauſe of 34 *H.* 8. which derogates from 26 & 33 *H.* 8. 243, 244

But 5 & 6 *E.* 6. being *puiſne* to thoſe *acts*, makes lands of the gift of the *king* in tail ſubject to forfeiture for treaſons 244

At common law *king* not intitled to a condition of re-entry in party attaint; but in what caſes he is intitled to ſuch a condition, or not, by 33 *H.* 8. 244 to 248

Title to a condition of re-entry deſcribed 244

Difference, where condition is tied up to the perſon, or not 244, 245

At common law *king* by attainder of treaſon not intitled to uſes or truſts 247

Truſts differ not from uſes in ſubſtance 248

Whether any other uſes but truſts at making of 33 *H.* 8. 248, 249

Why truſts kept from being executed by 27 *H.* 8. 248

Wherein held and uſed as different from uſes ib

Whether truſt of a freehold forfeited by attainder of treaſon 248, 249

King made a leaſe for years to one for proviſion of wines for the *king* in truſt for another, who was afterwards attainted of felony, held *king* ſhould have the truſt 248

So if one outlawed have a bond made to another in truſt, it ſhall be executed by information in *exchequer* or *chancery* ib

By attainder of *ceſty que truſt* in fee-ſimple, neither land nor truſt comes to the *king* or lord by eſcheat *Page* 249

Eſcheat only *ob defectum tenentis* ib

Attainder of felony not within 33 *H.* 8. ib

Difference between a term in groſs in truſt for party attaint, and truſt of a term to attend inheritances, *quoad* forfeiture for felony 250, 251

King intitled to a term for years in groſs, not in point of *eſcheat* by his prerogative, but as having *bona & catalla felonum* ib

At common law, *king* by attainder of treaſon, not intitled to any chattels, which party had *ex autre droit*, as executor, &c. or in right of a corporation aggregate 251

Baron poſſeſſed of a term in right of the *feme* forfeits it by attainder of treaſon, &c. ib

But as to lands of inheritance, whereof he is ſeiſed in her right, if he be attainted of treaſon, *king* hath the freehold during the coverture ib

So if tenant for life be attainted of treaſon, *king* hath freehold during life of party attainted; and ſo he had before 26 *H.* 8. by attainder of tenant in tail 251, 252

At common law, and now, in caſe of a corporation aggregate, nothing was, or is forfeited by attainder of the head of the corporation 252

At common law, a ſole corporation, as abbot, &c. by attainder of treaſon forfeited to the *king* the profits of their abbey, &c. during their incumbency; but their ſucceſſors not bound by ſuch forfeiture ib

But by 26 & 33 *H.* 8. theſe ſole corporations forfeited the inheritance, and their ſucceſſors were bound by ſuch attainders ib

But 5 & 6 *E.* 6. reſtores the right of ſucceſſors 253

By common law, all hereditaments, whether in tenure, or not, as rents, &c. are forfeited to the *king* by attainder of treaſon; but inheritances purely in privity, appropriate to the perſon, are not forfeited either by common law or ſtatute, as a founderſhip, &c. *Page* 253

At common law by huſband's attainder of treaſon or felony, wife loſt her dower; but *contra* by 1 *E.* 6. ib

By 5 & 6 *E.* 6. huſband attaint of treaſon, wife ſhall loſe her dower; and it ſtands ſo now, ſave in treaſons made by particular *acts*, where dower is ſaved, as, &c. ib

Tho theſe are called royal eſcheats, the *king* hath theſe forfeitures *in jure coronæ*, of whomſoever the lands be immediately held ib

A manor is held of the *king*, as of his honour of *D.* and manor *eſcheats* for felony of tenant, it is now parcel of the honour; and if *king* grant it out again generally, it ſhall be held of the honour; but if it *eſcheat* for treaſon, it is no parcel of the honour; and if granted out generally, it ſhall be held *in capite* 254

Where land comes to the crown by attainder of treaſon, all meſne tenures of common perſons are extinct; but if *king* grant it out, he is *de jure* to revive the former tenure, for which petition of right lies ib

If tenant in tail of the gift of the *king*, the reverſion in the *king* make a leaſe for years, and then is attainted of treaſon, the *king* ſhall avoid that leaſe, tho tenant in tail have iſſue living; yet if he after ſuch leaſe had bargained and ſold, or levied a fine to the *king*, the *king* ſhould be bound by ſuch leaſe, as long as there is iſſue ib

At common law divers lords had by ſpecial grant, or in right of their counties palatine, royal *eſcheats* of the lands held within their franchiſes of perſons attaint of treaſon, and ſeveral inſtances thereof *Page* 254, 255, 256

In what treaſons or not they ſhall have ſuch royal eſcheats 256, 257, 258

26 *H.* 8. in force as to forfeitures for treaſons within 25 *E.* 3. 257

There is a proviſo in 5 *Eliz.* whereby clipping is made treaſon, to ſave or confirm the rights of perſons intitled to ſuch royal eſcheats on attainders of treaſon within this *act* ib

No like clauſe in any other *act* of new treaſon ib

He, who hath *jura regalia*, ſhall not have forfeitures of tenant in tail for treaſon ib

Royal eſcheats by preſcription extend not to new treaſons 256 271

Of the forfeiture of lands in a county palatine by attainder of treaſon out of a county palatine, or *é converſo* 286

Antiently, if one had been ſlain in open war againſt the *king*, the *king* did *de facto* take a forfeiture, and how, and where taken 342

But in all other caſes, whether of felony or treaſon, if party died before attainder, or after conviction, and before judgment, there enſued neither attainder nor forfeiture of lands 343

If a traitor or felon reſcue himſelf, or will not ſubmit to be arreſted, and on reſiſtance is ſlain, on preſentment thereof he ſhall forfeit his goods and chattels; but whether preſentment traverſable; *per aſcuns*, he ſhall forfeit the iſſue of his lands for a year and day 343, 363, 489, to 492, 602

One arraigned for felony or treaſon,

ſon, tho he be acquitted, yet if it be found he fled, forfeits his goods *Page* 343
How far in treaſon attainder after party's death ouſted by ſtatute 343, 344
One attaint of piracy before commiſſioners of *oyer* and *terminer* on 28 *H.* 8. according to courſe of common law foreits lands and goods; but it works no corruption of blood 354
If huſband ſeiſed *in jure uxoris* hath iſſue by her, and then ſhe commits treaſon, and is attaint and dies, huſband ſhall be tenant by courteſy; *contra*, if treaſon committed by her before iſſue had 359
Tenant in tail is attaint of treaſon; *king* on office found hath the freehold during life of tenant in tail 359, 360
Attainder of treaſon, or felony of a copyhold gives the *king* no forfeiture; but it regularly belongs to the lord, if not a contrary cuſtom 360
By cuſtom of *Kent* lands of one attaint of felony deſcend to the heir; *contra* of treaſon; but the lands of one attaint of felony by outlawry, or one abjuring, eſcheat ib.
In petit treaſon and felony lands eſcheat to the lord; but *king* ſhall have *diem*, *annum* & *vaſtum* ib.
How to be computed ib.
Tenant in tail, or for life, or huſband ſeiſed in right of his wife is attaint of felony, *king* ſhall have the *year*, *day and waſt* againſt wife, iſſue and reverſioner ib.
Forfeiture for treaſon or felony to avoid *meſne* incumbrances relates to time of offenſe committed ib.
Two joint tenants in fee; one is attaint of treaſon, and dies; land ſurvives to the other, but ſubject to the title of forfeiture 360, 361
If one be outlawed on indictment of felony or treaſon, and pending the proceſs alien the land, yet *king* or lord ſhall have the land, which he held at time of felony committed; attainder by outlawry relates to day and year in indictment *Page* 361
In appeal of felony or murder by writ, if pending it party aliens, and then is outlawed before appearance, lord's eſcheat is loſt, becauſe it relates only to the time of outlawry pronounced, the writ containing no certain time of offenſe committed ib.
But *contra*, if defendant had appeared, and plaintiff had declared on his writ, and defendant had been convict and attaint; or if appeal had been by bill, and thereon party had been outlawed, tho before appearance, eſcheat had related to time of fact committed to avoid *meſne* incumbrances 362
Goods of perſons convict of treaſon or felony, or put in *exigent* for the ſame, or who fled, or ſtand mute, forfeit to the *king* ib.
To what times reſpectively theſe forfeitures relate ib.
Alienation made [of goods] *bonâ fide* by felon, or traitor, or one that flies, *meſne* between offenſe, or flight and conviction, or preſentment of flight is good, and binds the *king*, if fraudulent, it is void by 13 *Eliz.* 362, 367
If a felon be killed in flight, and it be found by inquiſition, forfeiture of his goods relates to the flight 362
If party comes not in, his goods forfeit on award of *exigent* 365
In murder, title of lord by eſcheat to avoid *meſne* incumbrances relates to ſtroke given 426, 591 ii. 179
In homicide *per infortunium*, party forfeits his goods, tho intitled, *quaſi de jure*, to a pardon on courſe 477, 478, 492
Officer killing felon in flight, or

that reſiſts, forfeits nothing *Page* 481, 493, 494
If the killing cannot be attributed to any *act* of the perſon killing, but of the deceaſed, the former forfeits not his goods, *quære* 492, 493
Where one killing another in his own defenſe forfeits his goods, or not 493, 494
Forfeiture for flight diſtinct from that for the felony ib
In petit larciny party forfeits his goods, and ſo if acquitted, and it be found he fled 530
In appeal of felony or robbery, if appellant omit any of the goods ſtolen in his appeal, they are forfeit; and ſo in the caſe of a falſe appeal of robbery, where appellee came to the goods by bailment, or finding 538
If it be found *ſuper viſum corporis*, that felon fled, and was killed in flight, this preſentment, tho after party's death, is concluſive as to the forfeiture for the flight ii. 154
By judgment of *peine fort & dure* party forfeits his goods; but it is no attainder, nor gives any eſcheat, nor works corruption of blood ii. 319
A convict within clergy forfeits all his goods, tho he be burnt in the hand: yet thereby becomes capable of purchaſing and retaining other goods ii. 388, 389
On burning in the hand, he ought to be immediately reſtored to poſſeſſion of his lands. ii. 389
Where alienee may falſify attainder in point of offenſe, as well as time or not. Vide Falſifying Attainder.
For forfeiture by felo de ſe, *and how it relates.* Vide Deodand, Felo de ſe.
Vide Corruption and Reſtitution of Blood.

Forgery.

Expoſition on 5 *Eliz.* making it felony without clergy, after former conviction 683 to 687
Former conviction to be conviction by judgment *Page* 384, 682, 683, 685, 686
Offenſe in any forgery or publication within this *act* after former conviction, felony 686
A convict of publiſhing a falſe deed forges a deed, it is felony within the *act*; ſo *è converſo* ib.
How indictment for ſecond offenſe to be ib
On evidence, record of firſt conviction to be proved, yet the matter of it not be re-examined ib
Where antedating a deed to avoid a man's own feoffment is forgery; intent herein conſiderable 683
What a making forging, or aſſenting to a forgery 683 to 686
Aſſent after makes not a principal, for that end it muſt be precedent or concomitant 684
Making a falſe cuſtomary, forgery ib
Where inſerting a clauſe in a will without direction of diviſor is forgery, or not ib
Forging ſurrenders, admittances, or court-rolls, within this *act* ib
Forging deed or will, purporting a leaſe, or rent-charge for years is within it; ſo is forging aſſignment of leaſe for years, but not of lands in *Ireland* ib
Where one publiſhes a deed, which he has been told to be falſe, is puniſhable within this *act* 685
Forging a will of goods within it ib
What ſtatutes or recognizances within it, or not ib
Juſtices of aſſiſe, or *oyer* and *terminer* have expreſſly cognizance of offenſes againſt this *act*; it extends to *B. R.* but not to juſtices of peace 686

Franchiſe.

He, who hath franchiſe of *infangthief*, gives judgment of death againſt

againſt a felon not within his juriſdiction, it is cauſe of ſeiſure of liberty, but not murder *Page* 498
Larciny cannot be committed of *treaſure trove*, or wreck till ſeiſed; tho he, that hath them in point of franchiſe, may have a ſpecial action againſt him that takes them 510
Bailiff of franchiſe having a gaol and cuſtody of a felon is chargeable for his eſcape, and not the ſheriff 595
Franchiſes to be quit *de murdro, latrocinio & eſcapiis* explained 604
Bailiff of franchiſe cannot execute proceſs within his franchiſe, but by ſheriffs mandate ii. 68
For franchiſes of coinage. Vide Coin.
Vide County Palatine, Forfeiture.

Frank-pledge.

Formerly all under twelve ought to have been in frank-pledge, ſave clergymen, noblemen, and knights, and their families ii. 74
A moſt excellent conſtitution ii. 75
Vide Amercements.

Freſh Suit and Purſuit.

Of reſtitution on appeals on freſh ſuit 539, 540, 541
How freſh ſuit to be inquired 540, 541

Fugam fecit. Vide Coroner, Forfeiture, Inqueſt of Office.

Gaol, Gaoler, and Priſoner.

IMPRISONING one ſo ſtrictly, that he dies, murder; therefore, where any one dies in gaol, coroner to be ſent for to inquire of his death *ii. 57* *Page* ~~498~~

Clerk of crown to view body of one dying in king's bench priſon ii. 58
If *mittimus* be not in writing and ſealed, gaoler liable to falſe impriſonment; but not, if party committed by a court of record 583, 584
If commitment expreſs no cauſe, gaoler in falſe impriſonment may aver that it was for felony 584
But he is not bound to receive felon on ſuch *mittimus* 595
Commitment by a juſtice ought to be to common gaol; but if offenſe committed, and party taken within a franchiſe, then by ſtatute to gaol *there* 585 ii. 123
Sometimes juſtices ſend priſoners, not having their bail ready, to ſome private priſon, as *New Priſon, &c.* till they can find bail; but this diſliked by the judges. ib
Sheriffs and gaolers bound to receive felons, whether committed by juſtices, or attached *ex officio* by conſtables or private men 585, 594 to 597
By ſtatute gaols of counties rejoined to counties 598
Where gaolers may put priſoners in irons to prevent their eſcape 601
Felony in gaoler by dureſs of impriſonment to make a man become approver againſt his will 640, 641
Tower, an exempt priſon from that of the ſheriff ii. 410
Charges of ſending criminals to gaol by common law to be born by vill where taken; but by ſtatute by priſoner, if able; if not, how levied ii. 96

Vide Arreſt, Breach of Priſon, Commitment, Eſcape, Reſcue.

Gaol-delivery.

Juſtices may aſſign a coroner to an approver ii. *Page* 31

Muſt ſend their records determined into the exchequer ii. 31, 36

The direction and tenor of their commiſſion ii. 32

By 8 *R.* 2. no *man of law* ſhall be juſtice in his own county ib

How expounded by 33 *H.* 8. as to the county; this prohibition uſually diſpenſed with by a *non obſtante* ib.

By charter mayor of *London* of the *quorum*, and ſo in *Norwich* ib

May proceed againſt priſoners, (if in gaol) on inquiſition before coroner, or any other juſtices ib

Juſtices of peace muſt ſend to them their indictments not determined, whether of felonies or treſpaſſes ib.

The import of their precept to the ſheriff; in whoſe name, and under whoſe *teſte* it is to be ii. 32, 33, 261

What to be done on return of precept ii. 33

May take indictment, try and give judgment ſame day ii. 29, 34

May command ſheriff *ore tenus* to return a pannel ii. 34

They may deliver by proclamation perſons impriſoned, where no indictment preferred, or indictment preferred, and *ignoramus* found, which *per aſcuns*, cannot be done by juſtices of *oyer* and *terminer*, or peace ib

May originally take indictments of felony of priſoners in gaol ib

Where felon is at large, by which of their powers in their commiſſion they may take indictment ib

Juſtices of *oyer* and *terminer*, gaol-delivery, and of the peace may make up their records by all three of their powers; and if good by any one commiſſion, it is ſufficient, and beſt ſhall be taken for the *king* ib

Priſoner let to bail in law is in priſon, and therefore juſtices of gaol-delivery may take indictment againſt him; but one let to mainpriſe, not in cuſtody ii. *Page* 35

They may deliver gaol of perſons committed for treaſon ib

Others may be added, or their power contracted by *aſſociation*, or *ſi non omnes* ii. 23

Subſequent juſtices have power by ſtatute to give judgment on one reprieved after conviction ii. 35

May award execution on judgment given by former juſtices ib

If one be indicted and outlawed for felony before juſtices of peace, yet if he be in priſon, by common law juſtices of gaol-delivery may award execution on that outlawry ib

New juſtices by 1 *E.* 6. may proceed in every behalf, as if the old commiſſions or commiſſioners had continued not altered ii. 35, 405

Juſtices may receive appeals by bill againſt any one in gaol ib

May aſſign coroner to an appeal, and make proceſs againſt appellee in a foreign county ii. 36

Sheriff is to deliver to them names of all perſons in gaol or bailed ib

If an *act* limit ſpecially an offenſe to be heard and determined by juſtices of peace; *quære*, whether juſtices of gaol-delivery, or *oyer* and *terminer* may hear and determine it ib

But where *act* ſpeaks only of juſtices in the county, it may be tried either before juſtices of *oyer* and *terminer*, or gaol-delivery ib

By ſtatute they have power to reform pannel *ore tenus*, either of grand or petit jury ii. 36, 156*, 265

Clerks of the crown, &c. are to certify into *B. R.* names of all perſons outlawed, attaint, or convict,

convict, and ſuch names ſhall be certified to juſtices of gaol-delivery ii. *Page* 36, 37
Juſtices of gaol-delivery may ſend priſoners by *habeas corpus* to ſheriff of another county, with a precept for him to receive them, *viz.* for a felony committed in that county, tho it be out of their circuit ii. 37
Of neceſſity juſtices of gaol-delivery have in ſome caſes power out of the precincts of their county or circuit ib
Whether they can iſſue proceſs of outlawry ii. 37, 199
A. and *B.* are indicted before juſtices of peace, and by 4 *E.* 3. indictment is delivered over to juſtices of gaol-delivery, *A.* appears, is tried and acquitted, *B.* appears not, the juſtices of peace cannot make out proceſs againſt *B.* becauſe record not before them; nor can juſtices of gaol-delivery make out proceſs to outlawry returnable before the juſtices of peace ii. 37
Neither can they proceed to outlawry before themſelves, as juſtices of *oyer* and *terminer*, where indictment taken before juſtices of peace, but the intire record muſt be removed into *B. R.* by *certiorari*, and from thence proceſs of outlawry iſſue ii. 37, 38
By 26 *H.* 8. what crimes committed in *Wales*, juſtices of peace and gaol-delivery in counties adjacent to *Wales* have power to hear and determine ii. 38
Repealed, as to treaſon, by 1 & 2 *P.* & *M.* but in force as to other felonies ib
They are by ſtatute to hold their ſeſſions, where county-court held but ſtatute only directive 239
They may, after priſoner has pleaded, take his pannel from ſheriff without making any precept to him ii. 261
Where commiſſion ſpecial, they do not ſend out a general precept to the ſheriff to return juries againſt they come ib
New juſtices may award execution on a party reprieved after judgment *Page* 405
But not fit, to give judgment, or award execution on one reprieved by another judge, without knowing on what grounds the reprieve was ii. 406
Precepts, as *venire fac.* &c. by them, need not be otherwiſe than by award on the roll ii. 410
For jury-proceſs iſſued by juſtices of gaol-delivery. Vide Trial.
Power of making juſtices of gaol-delivery in counties palatine, and franchiſes reſumed. Vide County Palatine.
Vide Commiſſion, Court, Juſtices of Aſſiſe, Juſtices of Peace, King's Bench, Oyer and Terminer, Proceſs.

Goods. Vide Forfeiture, Reſtitution, Seizure.

Grand Larciny. Vide Larciny.

Grand Jury. Vide Jury.

Grant.

Grant of judicial, or miniſterial offices, concerning adminiſtration of juſtice, during *king's* pleaſure, is determined by his death 706
Grant of a judicial office, *quam diu ſe bene geſſerit*, tho a freehold, is determined by his death ib
But grants of offices of a different kind, or of lands *durante beneplacito*, are not determined without ſome act or declaration by the ſucceſſor ib
Forfeiture of goods for treaſon, ſame as forfeiture for felony; but a difference in grants thereof 239
A manor held of the *king*, as of his honour of *D.* eſcheats for felony of tenant, it is now parcel of

of the honour; but if it eſcheat for treaſon, it is no parcel of the honour; and if granted out generally, ſhall be held *in capite* *Page* 254

Habeas Corpus.

WHERE temporal judge might have taken notice incidently, whether a tenet was hereſy or not, and *nient obſtante* return of dioceſan, have delivered party impriſoned on this writ 400, 407, 408
Cauſe neceſſary to be expreſſed in commitment, in order to be returned on *habeas corpus* 584
It is *quaſi* a writ of right, or error to determine, whether impriſonment good or erroneous ib
Where juſtices of gaol-delivery may ſend priſoners by this writ to ſheriff of another county out of their circuit ii. 37
Of writ of *habeas corpus ad ſubjiciendum*, and bailing thereon ii. 143 to 148
What to be done on return being filed ii. 143
Party to be remanded till return filed ii. 146
Whence it iſſues ii. 143, 144
When it iſſues out of *C. B.* or *Exchequer*, it is where party is privileged, or to charge him with an action ii. 144, 312, 313
If one be ſued in *C. B.* or is ſuppoſed to be ſo ſued, and is arreſted for a pre-ſuppoſed miſdemeanor, or for felony, this writ lies there; and if it appears on return, that party is wrongfully committed, the privilege ſhall be allowed, and party diſcharged; or if doubtful, bailed to appear in *B. R.* ii. 144
If one be ſued in *C. B.* and is arreſted and impriſoned for felony *&c.* tho gaoler on *habeas corpus* ought to return the cauſes, as well criminal, as that wherewith he is charged out of that court, yet *C. B.* ought not to commit to the *Fleet*, nor diſcharge him, nor take bail to anſwer there, but may bail on the action, and remand him to ſheriff as to the crime *Page* 144
C. B. have now by *ſtatute* original juriſdiction to bail, diſcharge, or commit on this writ one committed by council-table, as well as *B. R.* and that tho party hath no privilege ii. 144, 145
B. R. and *Chancery* have an original juriſdiction to grant this writ and bail, *&c.* tho no privilege returned ii. 145, 147
Of *habeas corpus ad faciendum & recipiendum* granted by *B. R.* when granted, and before whom returnable ib
If a civil action and matter of crime be returned, and action appear to be fraudulent, party may be remanded; if real, court may commit him to the marſhal with his cauſes, tho they are matters of crime ib
On writ *ad faciendum*, *&c.* not ſingly a matter of crime ought to be returned, for that belongs to writ *ad ſubjiciendum* ib
When *habeas corpus* in criminal cauſes iſſues out of chancery, and cauſe is returned, chancellor may judge thereof, and may diſcharge or bail priſoner to appear in *B. R.* or may *propriis manibus* deliver record in *B. R.* and thereon *B. R.* may proceed to bail, *&c.* ii. 147
But if chancellor diſcharge him not, but bail him, ſurety muſt be to appear in *B. R.* or if chancellor will do neither, he may commit him to *Fleet* till term, and then he may be turned over to *B. R.* and there proceeded againſt; chancellor hath no power to proceed in criminal cauſes ib
Habeas corpus (before 31 *Car.* 2.) in criminal cauſes ſhould regularly have iſſued out of chancery in vacation, and *B. R.* in term ib

Sending *habeas corpus ad faciendum & recipiendum* by chancellor for perſons arreſted in civil cauſes not warranted by law, and as to perſons in execution, forbidden by ſtatute ii. *Page* 148
Habeas corpus removes body, *certiorari* record ii. 210, 211
Court cannot on bare return of *habeas corpus* give any judgment, or proceed on record of indictment, unleſs removed by *certiorari*; but it ſtands in ſame force it did, tho return be adjudged ill, and party be diſcharged; and court below may iſſue new proceſs on indictment, tho *contra* on *habeas corpus* in civil cauſes, for therein it is a *ſuperſedeas* ii. 210, 211
By whom *habeas corpus* to be ſigned ii. 211
For other matters. Vide Certiorari.

Hawks. Vide Felony by Statute, Larciny.

Herefy. Vide Religion.

Homage. Vide Alligeance.

Homicide.

The ſeveral kinds of homicide 424
Homicide defined 425
Involuntary homicide defined 471
In this caſe, indictment muſt find ſpecial matter, or if indictment be of murder or manſlaughter, and on trial it appear to be involuntary, how jury to find ib
Priſoner in ſuch caſe muſt plead *not guilty* 471, 478
Diviſion of involuntary homicide 471
Homicide *per infortunium* defined and exemplified 472
If one ſhoot at butts, and by caſualty his hand ſhakes, and arrow kills a by-ſtander *per infortunium* ib
So if a carpenter or maſon in building caſually let fall a piece of timber, &c. and kills another *Page* 472, 475
But if he voluntarily let it fall without giving due warning, whereby it kills another, it will be at leaſt manſlaughter, *quia debitam diligentiam non adhibuit* ib
So if one be felling a tree in his own ground, and it fall and kill another, chance-medley ib
Tho chance excuſeth from felony, it excuſeth not from treſpaſs ib
If two play at barriers, or run a-tilt by *king's* command, and one kill the other, it is *per infortunium*; but without it, manſlaughter 473
If a ſchool-maſter correct his ſcholar, &c. who by ſtruggling, or otherwiſe dies, only *per infortunium* 474
But if correction be with a *lethal* inſtrument, or outrageous, it is murder ib
Several come to enter the houſe of *A.* as treſpaſſers, *A.* ſhoots and kills one, manſlaughter; *contra* if they had entered to commit a felony ib
Where, on an alarm that thieves were breaking into the houſe in the night, the maſter killed a ſervant hid in a buttery thro' fear of being diſcovered by them, (the ſervant being miſtaken for one of the thieves, and not diſcerned in the dark) it was held no felony; *quære*, whether homicide *per infortunium* ib
If one knowing that people are paſſing along the ſtreet throw a ſtone, or ſhoot an arrow over the houſe or wall, with intent to do hurt, and one is thereby ſlain, this is murder; and if without ſuch intent manſlaughter, and not *per infortunium*, becauſe *act* unlawful 475
One, in ſhooting at a deer in his own park, by accident kills another

other man, homicide *per infortunium*; but *contra*, if it be in the park of a ſtranger without his licence, then it is manſlaughter *Page* 475
A. throws a ſtone at a bird, and thereby kills a man, to whom no harm intended, *per infortunium* ib
But if he had thrown it to kill the poultry, or cattle of *B.* and the like accident had happened, it had been manſlaughter, but not murder; becauſe not with intent to hurt the by-ſtander ib
An *act* prohibits ſhooting in a gun without ſuch a qualification, and under a penalty; one unqualified ſhoots with a gun at a bird, and it kills a by-ſtander by ſome accident, that in another caſe would have amounted only to chance-medley; this no more than chance-medley in him, keeping a gun in ſuch caſe, being only *malum prohibitum* 475, 476
A ſervant ſet by his maſter to watch in the night in a corn-field with a gun charged, and ordered by him to ſhoot when he heard any buſtle in the corn by deer; maſter himſelf improvidently ruſhes into the corn, ſervant ſuppoſing it to be deer, ſhoots and kills his maſter, only chance-medley, becauſe ſervant miſguided by his orders 476
But if maſter had not given ſuch orders, it would have been manſlaughter, becauſe he did not *adhibere debitam diligentiam* to diſcover his mark ib
A. drives his cart careleſly, and it runs over a child in the ſtreet, if *A.* having ſeen the child, yet drives on upon him, it is murder; but if he ſaw not the child, manſlaughter; but if child had run croſs the way, and cart run over it before it was poſſible for carter to ſtop, it is *per infortunium* ib
If one riding in the ſtreet whip his horſe to put him into ſpeed, and run over a child and kill him, homicide, and not *per infortunium*; and if he had rid ſo in a preſs of people with intent to do hurt, and horſe had killed another, it had been murder *Page* 476
But if one be riding in the ſtreet, a by-ſtander whips the horſe, whereby he runs away againſt will of rider, and runs over and kills a man, it is chance-medley only, in which caſe jury are to find the ſpecial matter; yet where coroner's inqueſt finding ſpecial matter ſtands untraverſed, court will receive verdict of *not guilty* on indictment by grand inqueſt, and party confeſſing indictment by coroner, ſhall have his pardon of courſe 476, 477
Killing another *per infortunium*, not in truth felony, how verdict concludes; party forfeits his goods, and why; tho he ought to have *quaſi de jure* a pardon of courſe, yet he is not to be diſcharged, but bailed till next term or ſeſſions to ſue out ſuch pardon 477
Homicide *ex neceſſitate*, partly voluntary, partly involuntary 478
Neceſſity of two kinds: 1. Of a private nature. 2. That which relates to public juſtice and ſafety ib
Former obliges one to his own defenſe and ſafe-guard, and what inquiries this takes in ib
Two kinds of homicide *ſe defendendo*, and reſpective conſequences thereof ib
Homicide *ſe defendendo* defined 479
What circumſtances therein obſervable 479 to 484
There being malice between *A.* and *B.* they appoint time and place to fight, and meet, *A.* gives firſt onſet, *B.* retreats as far as he can with ſafety, and then kills *A.* who had otherwiſe killed him, murder; becauſe they met by compact 479

There

There being malice between *A.* and *B.* they meet caſually; *A.* aſſaults *B.* and drives him to the wall; *B.* in his own defenſe kills *A.* this *ſe defendendo* *Page* 479

A. aſſaults *B.* and *B.* preſently thereon ſtrikes *A.* without flight, whereof *A.* dies, this is manſlaughter; but if *B.* ſtrike *A.* again, but not mortally, and blows paſs between them, and at length *B.* retires to the wall, and being preſſed on by *A.* gives him a mortal wound whereof *A.* dies, only *ſe defendendo* ib

A. by malice makes a ſudden aſſault on *B.* who ſtrikes again, and bearing hard on *A.* *A.* retreats to the wall, and in ſaving himſelf kills *B.* whether murder, or *ſe defendendo*; what fact the queſtion depends on 479, 480

In homicide *ſe defendendo*, ſome *act* to be done by party killing, for if he be merely paſſive, only *per infortunium* 480

A. aſſaults *B.* who flies to the wall, or falls holding his ſword, *&c.* in his hand, *A.* runs violently, or falls on knife, *&c.* of *B.* without any ſtroke or thruſt offered by *B.* and dies, *per infortunium*; *quære*, whether *A. felo de ſe* 480, 481

He, who kills in his own defenſe, ought to fly, as far as he may, to avoid violence of aſſault, before he turn on aſſailant 481, 483, 486

Argument againſt duelling ib

If gaoler be aſſaulted by priſoner, or ſheriff, or bailiff in execution of his office, he is not bound to give back to the wall; but if he kill aſſailant without ſuch retreat, only *ſe defendendo* ib

The like of a conſtable, or watchman 481

But if priſoner reſiſts not, but flies, yet officer for fear of reſcue gives priſoner a mortal ſtroke, it is murder; for here was no aſſault firſt made by priſoner, and ſo cannot be *ſe defendendo* in officer *Page* 481

Difference between civil actions and felonies ib

If one be in danger of arreſt by *cap.* in debt, *&c.* and he flies, and bailiff kills him, murder ib

But if felon flies, and cannot be otherwiſe taken, if he be killed, juſtifiable, and officer forfeits nothing; but perſon killed forfeits his goods ib

A thief aſſaults a true man, either abroad, or in his own houſe, to rob or kill him, true man not bound to give back, but may juſtify killing aſſailant, and it is no felony ib

If *A.* aſſault *B.* ſo fiercely, that *B.* cannot ſave his life, if he give back, or if *B.* fall to the ground, whereby he cannot fly, if *B.* kills *A.* it is *ſe defendendo* 482

Where firſt aſſailer may be ſaid to kill the aſſailed *ſe defendendo*, or not 482 to 484

If *A.* aſſault *B.* and *B.* thereon re-aſſault *A.* and *A.* flies to avoid the aſſault of *B.* who purſues him, and then *A.* being driven to the wall turns again, and kills *B.* whether *ſe defendendo* 482

But if *A.* aſſaults *B.* firſt, and *B.* re-aſſaults *A.* ſo fiercely, that *A.* cannot retreat to the wall, or other *non ultra*, without danger of his life, nay, tho *A.* fall on the ground on the aſſault of *B.* and then kills *B.* murder or manſlaughter ib

Where one is aſſaulted ſo fiercely, that he cannot fly, law will interpret this neceſſity to a flight to give him the advantage of *ſe defendendo*: but *contra*, where firſt aſſailant is re-aſſaulted ſo vigorouſly that he cannot fly, law will not let him take advantage of this neceſſity, the conſequence of his own wrong ib

Where

Where *A.* the firſt aſſailant flies, and the affray is interrupted, and *B.* the firſt aſſaulted purſues *A.* to kill him, and *A.* after his flight, on neceſſity of ſaving his life, kills *B.* it is but *ſe defendendo*; but when done altogether, without any interval of flight or parting, and *B.* gains the preſent advantage by his addreſs or courage to preclude flight of *A.* and then *A.* kills him, manſlaughter *Page* 483

Flight to gain advantage of *ſe defendendo* to party killing muſt not be feigned, or to gain advantage of breath, *&c.* it muſt be from the danger, as far as party can, either by reaſon of ſome wall or other *non ultra*, or as fierceneſs of aſſailant will permit ib

Whether party killing was guilty of firſt breach of peace, conſiderable in theſe caſes ib

What offenſe, if one kill another in the neceſſary ſaving of the life of a man aſſaulted by party ſlain 484

A. aſſaults the maſter, who flies as far as he can to avoid death, ſervant kills *A.* in defence of his maſter, it is homicide *defendendo the maſter*, and ſervant ſhall have his pardon on courſe: ſo where maſter kills in neceſſary defence of ſervant ib

Like law, where huſband kills in defence of wife, parent of child, and *é converſo* ib

How far relation of acquaintance, and mutual ſociety will excuſe one companion killing in neceſſary ſafe-guard of life of another ib

Killing one attempting to rob or kill another in caſe of neceſſity puts him in condition of *ſe defendendo* his neighbour 484, 485

A woman kills a man aſſaulting to raviſh her in the attempt, *ſe defendendo* 485

So it is, if huſband or father kill him in the attempt, if it could not be otherwiſe prevented; but if it might, it is manſlaughter *Page* 485, 486

What the offenſe in killing him, that takes the goods, or doth an injury to the houſe or poſſeſſion of another, herein many differences, as between a treſpaſſable and felonious *act*, and felonious *acts* themſelves 485 to 489

If *A.* pretending title to the goods of *B.* take them away from *B.* as a treſpaſſer, *B.* may juſtify beating *A.* but if he beat him, ſo that he dies, it is manſlaughter 485, 486

A. is in poſſeſſion of *B.*'s houſe, *B.* endeavours to enter on him, *A.* can neither juſtify aſſault, nor beating of *B.* becauſe *B.* had right of entry; but if *A.* be in poſſeſſion of a houſe, and *B.* as treſpaſſer enters on him, *A.* may *molliter manus imponere* to put him out, and if *B.* reſiſt, and aſſault *A.* then *A.* may juſtify beating him *de ſon aſſault demeſne* 485

But if *A.* kill him in defence of his houſe, it is manſlaughter 485, 486, 487

A. being in poſſeſſion of a houſe by title, *B.* endeavoured to enter, and ſhot an arrow at them within, and *A.* from within ſhot an arrow at thoſe that would have entered, and killed one of them; not *ſe defendendo*, but manſlaughter, becauſe no danger of *A.*'s life from them without 485, 486

If *B.* had entered into the houſe, and *A.* had *gently laid his hands* on him to turn him out, and then *B.* had turned on him and aſſaulted him, and *A.* had killed him, ſo if *B.* had entered on him and aſſaulted him firſt, and *A.* had killed him, it had been only *ſe defendendo*, tho entry of *B.* was not to murder, but as a treſpaſſer to gain poſſeſſion 486

A. in ſuch caſe being in his own houſe

houſe need not fly as far as he can *Page* 486
Huſband kills adulterer in the *act*, manſlaughter ib
Difference between killing a man attempting an *act*, which is felony or otherwiſe, as to making it *ſe defendendo*, *&c.* ib
If one come to rob me, and take my goods as a felon, and I kill him, it is *me defendendo* at leaſt, and in ſome caſes juſtifiable ib
At common law, if a thief had aſſaulted a man to rob him, and he had killed him in the aſſault, it had been *ſe defendendo*; but *quære*, whether he had forfeited his goods 487
One attempting a burglary with intent to ſteal, or kill, or attempting to burn the houſe of another, if owner of the houſe, or any within had ſhot and killed the perſon ſo attempting, this had been no felony or forfeiture ib
By 24 *H.* 8. killing any one attempting any robbery or murder in or near the highway, *&c.* or in a manſion-houſe, or attempting to break a manſion-houſe in the night by any perſon, *&c.* he who kills (tho a lodger or ſervant) ſhall be abſolutely acquitted and diſcharged of the death of ſuch perſon ib
There being malice between *A.* and *B.* and having fought often, and afterwards meeting ſuddenly in the ſtreet, *A.* ſaid he would fight him, *B.* declined it, and fled to the wall, and called others to witneſs it, and *A.* purſued and ſtruck him firſt, and *B.* in his own defenſe killed him, he was acquit from any forfeiture by this *act* 487, 488
Treſpaſſes in houſes, or in or near highways, are left as before this *act* 488
It doth not indemnify killing a felon, where felony not accompanied with force as killing one attempting to pick a pocket ib
What breaking of a houſe in the day this *act* extends to, or not *Page* 488
One attempting wilful burning of a houſe is killed in the attempt, the killer is free from forfeiture without aid of this *act* ib
If any felon, after felony committed, reſiſt thoſe that attempt to take him, or fly and be killed, this killing no felony; but this *act* relates not to it ib
If a felon before arreſt reſiſts and flies, or after arreſt eſcapes and flies, and the officer, not being able to take him without killing, kills him, officer ſhall be found *not guilty*; but if he could have been taken without killing, it is manſlaughter at leaſt in the officer, and jury is to inquire, whether done of neceſſity or not 489, 490
So where private man without warrant, of neceſſity kills a felon reſiſting and flying before arreſt, or after arreſt eſcaping and flying, tho felon not indicted, it is juſtifiable, for in ſuch caſe, law makes every one an officer to take a felon 587, 588 ii. 77, 78, 82
A felon is taken, and in bringing to gaol eſcapes, villagers purſue and of neceſſity kill him, they ſhall be acquitted 489, 490
A felony done, but not by *A.* and *B.* hath a warrant, or *hue* and *cry* comes to *B.* as conſtable to take *A.* *A.* attempts an eſcape, or reſiſts, *B.* kills him of neceſſity, tho *A.* be not indicted, juſtifiable 490
In all caſes of homicide by neceſſity matter may be ſpecially preſented by grand or coroner's inqueſt, and thereon party may be preſently diſcharged without being put to plead, but may be indicted again, if former indictment falſe; *contra*, where indictment ſimply of murder or manſlaughter 491, 492. ii. 158

Ex-

Expoſition on 21 *E.* 1. *de malefactoribus in parcis* *Page* 491.
Caſes, where priſoner is not to forfeit his goods, but be acquitted, re-capitulated 493, 494
A. ſhooting at rovers, if *B.* after arrow delivered of his own accord runs into the place, where it is to fall, and ſo is killed, *A.* forfeits nothing, *quære* 492
If coroner's inqueſt find ſpecially *ſe defendendo*, party ſhall be arraigned and tried, whether it was in his own defence or not, before he ſhall have his pardon of courſe 493
A conſtable, who commands *king's* peace in an affray, is reſiſted, he need not give back to the wall, and if he kill thoſe that reſiſt, it is juſtifiable 494
Killing a rioter, who reſiſts, by ſheriff, juſtice of peace, or conſtable, or his aſſiſtants, no felony at common law, nor makes any forfeiture 53, 294, 495, 496
What authority *homicide in execution of juſtice* requires in the judge and officer, who executes the judgment 497
Where judge hath juriſdiction, tho he err, officer in executing judgment juſtified; *contra*, where judge hath no juriſdiction 501
If after or before arreſt *A.* an innocent man ſuſpected draws his ſword and aſſaults *B.* the party ſuſpecting, and *B.* preſſeth on him, either to take or detain him, and in conflict *A.* kills *B.* it is murder; but if *B.* kills *A.* juſtifiable ii. 83
If before or after arreſt, bailiff on aſſault made on him kills the party, it is juſtifiable, neither is he bound to retreat ii. 83, 118
If perſons purſued by peace-officers for felony, or breach of peace or juſt ſuſpicion thereof, as night-walkers, *&c.* ſhall not yield themſelves to theſe officers, but either reſiſt or fly before taken, or being taken reſcue themſelves, and reſiſt or fly, and are on neceſſity ſlain; no felony in officers or aſſiſtants, tho parties killed are innocent ii. *Page* 85, 86
By their reſiſtance againſt authority of the *king* in his officers, they draw their own blood on themſelves, and are acceſſaries to their own death ii. 86, 118
One charged with ſuſpicion of felony on juſt grounds, and where a felony is actually done, tho he be innocent, yet if he reſiſt officer after notice that he is ſuch, and aſſault him, and officer kill him, no murder ii. 92, 93
If he fly, and cannot be otherwiſe taken, whether officer may kill him 490. ii. 93
One is dangerouſly wounded, and conſtable is killed on purſuit of offender, murder; but if he kills offender, juſtifiable ii. 94
A warrant iſſues againſt one for treſpaſs, or breach of the peace, and he flies, and will not yield to arreſt, or being taken eſcapes, and officer kills him, murder ii. 117
But if he either on attempt to arreſt, or after arreſt aſſault officer who hath the warrant, with intent to eſcape, and officer ſtanding on his guard kills him, neceſſity excuſeth him, and he is not bound to retreat ii. 117, 118
Where a warrant iſſues againſt a felon, or only as one ſuſpect, and either before or after he flies and defends himſelf with ſtones, *&c.* ſo that officer kills him on neceſſity, no felony: and ſo where conſtable doth it *virtute officii*, or on purſuit of *hue* and *cry* ii. 118
But where warrant is againſt one ſuſpect only, what cautions to be uſed ii. 118, 119
Private man may arreſt a felon; if he kill him of neceſſity, he is ex-

excuſable; but then it is at his peril that he be a felon; if not, at leaſt manſlaughter ii. *Page* 119
In caſe of juſtifiable homicide, or that which is not felony, what coroner's inqueſt to find, and how indictment to be, and what proceedings to be had therein in order to diſcharge the priſoner ii. 303
In indictment or appeal of felony defendant cannot juſtify, but ſhall have advantage of it on general iſſue ii. 304
Felony committed by *B.* but *A.* that arreſts him, knows it not, law ſame as if he knew it, only what he does is at his peril ii. 78

Vide **Forfeiture, Indictment, Judgment, Murder and Manslaughter.**

Homine replegiando. Vide **Bail.**

House.

Where aſſembly to defend one's houſe juſtifiable; it is a man's caſtle of defence 445, 487, 547
If one be aſſaulted in his houſe by a treſpaſſer attempting to gain poſſeſſion, he need not fly as far as he can, for he hath the protection of his houſe to excuſe him from flying 486
Where an aſſault, battery or homicide is excuſable or juſtifiable, in defence of poſſeſſion of a man's houſe, or not. Vide **Homicide, Murder and Manslaughter.**

Hue and Cry.

A good warrant to purſue and take criminals without warrant of juſtice of peace, and tho no conſtable be in purſuit; and killing any of the purſuants by malefactor, murder; all malefactors in ſame field principals in the murder 465
Conſtable and vill bound to purſue, or elſe fineable 588. ii. 99, 102
One preſent at commiſſion of a felony bound to endeavour to take felon, or raiſe *hue* and *cry* *Page* 588. ii. 99, 102
It is the old common law proceſs after felons, and ſuch as have dangerouſly wounded another ii. 98
By *Weſtm.* 1. perſons on *hue* and *cry* not purſuing felons, how puniſhable ib
By 4 *E.* 1. how and in what caſes to be levied ib
Statute of *Winton* makes a further proviſion touching *hue* and *cry* ii. 98, 99
Levied and not purſued, an article inquiſible in the *leet* ii. 99
Tho ſometimes proper to have a juſtice of peace to direct his warrant for raiſing *hue* and *cry* yet not of neceſſity, or ſometime convenient ii. 99, 100, 102
Purſuants in conſtable's aſſiſtance may plead the general iſſue on 7 & 21 *Jac.* therefore expedient conſtable be called to this action ii. 99, 100, 104
Yet may be raiſed by country in his abſence, which is called cry *de pais* ii. 100
If raiſed, and no felony committed, or on an innocent man, how they that raiſed it are puniſhable ii. 102, 104
Where murder to kill purſuants, tho without warrant or conſtable 465. ii. 100
What party raiſing it is to do, and what duty of conſtable thereon ii. 100, 101
Puſuants on a ſuppoſed felony, not actually committed, may arreſt and proceed, as if real felony done ii. 101, 102
There needs no averment that a felony was done in juſtification of impriſonment on *hue* and *cry* levied ii. 101, 102, 104
Yet it muſt be averred, that an information was given that the felony was done, if arreſt be by that conſtable that firſt received the information, and ſo raiſed

the

the *hue* and *cry*; or if arreſt was made by that conſtable or thoſe vills to whom *hue* and *cry* came at ſecond hand, what muſt be averred ii. *Page* 104
As *hue* and *cry* neither deſcribes, nor names perſon of felon, but only felony done; and therefore arreſt of perſon is left to diſcretion of conſtable, or people of ſecond or third vill; he that arreſts any one on ſuch general *hue* and *cry* muſt aver that he ſuſpected, and ſhew a reaſonable cauſe of ſuſpicion ib
If one purſued on *hue* and *cry* be in a houſe, and doors ſhut, and refuſed to be opened, conſtable on demand, *&c.* may break open doors ii. 102
Same law on dangerous wound given, and *hue* and *cry* levied on offender ib
If offender cannot be otherwiſe taken may be killed ib
Conſtable on *hue* and *cry* may ſearch in ſuſpected places within his vill, yet his entry muſt be *per oſtia aperta*, for he cannot break open doors barely to ſearch, unleſs party be there ii. 103
It is a ſort of proceſs, whereby conſtable may arreſt by deſcription ib
Purſuants to take ſuch as they have probable cauſe to ſuſpect ib
Who are ſuſpicious perſons ib
Where they that live and have land in the hundred are competent witneſſes, or not, in action againſt hundred ii. 280, 281

Husband and Wife. Vide Coverture.

Ideot, Lunatick and Madman.

REGULARLY no incapacities excuſe the parties from damages to be recovered againſt them in a civil action for any *act* done by them; but *contra*, where proceedings are *ad pœnam* *Page* 16
Ideocy, *madneſs*, and *lunacy*, fall under the general name *dementia* 29
Tho by law no man ſhall avoid his own *act* for theſe defects, tho his heir or executor may, yet as to capital offenſes he hath the advantage thereof ib
Ideot deſcribed; *Ideocy or not*, how tried ib
Dementia accidentalis, *vel adventitia*, from what cauſes it proceeds 30
Diſtributed into a partial and total inſanity ib
Of partial inſanity 30, 412
It ſeems not to excuſe party in doing any capital offenſe 30
Moſt offenders under a degree of partial inſanity, when they commit their offenſes 30, 412
Difficult to define indiviſible line, that divides perfect and partial inſanity 30
It muſt reſt on circumſtances ib
Caution againſt inhumanity towards defects of human nature, and *è contra*, againſt too great indulgence to great crimes ib
What meaſure of underſtanding is ſufficient not to excuſe in capital offenſes ib
A total alienation of mind excuſeth ib
Accidental *dementia*, whether total or partial, diſtinguiſhed into *phrenſies* and *lunacy* 31
The moon hath great influence in all diſeaſes of the brain 30
When ſuch perſons are in the height of their diſtemper ib
One abſolutely mad for a day, killing another in that diſtemper is equally *not guilty*, as if mad without intermiſſion ib
When lucid intervals ordinarily happen ib
Crimes committed by lunaticks during their lucid intervals are ſubject to ſame puniſhment, as if they had no ſuch defect ib

Alien-

Alienations and contracts made during ſuch intervals bind their heirs and executors *Page* 30
Accidental *dementia*, whether *temporary* or *permanent* is, either *furor*, &c. or *delirium*, &c. ib
The cauſes and effects of *furor*, &c. and ſo of *delirium*, &c. ib
Dementia affectata, or drunkenneſs regularly excuſeth not, except in two caſes, and what theſe are 32
Eaſy to counterfeit madneſs ib
Degrees whereof various, ſome ſufficient, ſome not, to excuſe in capital offenſes 32, 33
How madneſs with reſpect to offenders to be tried 33
Ideocy, &c. how tried in order to the commitment or cuſtody of perſon and eſtate ib
King has an intereſt in an *ideot*, but in caſe of a *lunatick* it is only a truſt in him ib
Party found *ideot*, &c. may be brought before chancellor or *king* for inſpection ib
All men of age of diſcretion ſuppoſed *ſane*, unleſs contrary proved, and that as well in caſes civil as criminal ib
If one be a *lunatick*, and hath *lucida intervalla*, and this be proved, yet law preſumes acts or offenſes of ſuch a perſon to be committed in thoſe lucid intervals, unleſs contrary appears, and that as well in civils as criminals 34
In civil cauſes he, who alledges an *act* done in time of lunacy, muſt ſtrictly prove it ſo; yet in criminals (where court is to be ſo far of counſel with priſoner, as to aſſiſt in matters of law, and true ſtating the fact), if a lunatick be indicted of a capital crime, and this appear, witneſſes muſt be examined, whether priſoner under actual *lunacy* at time of offenſe done ib
Surdus and *mutus a nativitate* preſumed an *ideot*, unleſs contrary appear; if ſo, he may be tried and executed, tho caution to be uſed herein *Page* 34
If one, while *ſane*, commit a capital offenſe, and before arraignment become abſolutely mad, he ought not to be arraigned during ſuch phrenſy, but remitted to priſon till he recover 34, 35
If ſuch a man after his plea, and before trial, become of *non ſane memory*, he ſhall not be tried; or if, after his trial, he become ſo, he ſhall not receive judgment; or if after judgment, his execution ſhall be ſpared and why 35
Proper to impannel a jury to inquire *ex officio* touching ſuch inſanity ib
If a madman commit homicide during his inſanity, and continue ſo till he comes to be arraigned, he ſhall neither be arraigned nor tried, but remitted to gaol, to remain in expectation of *king*'s grace ib
But fit in ſuch caſe to ſwear a like inqueſt *ex officio* ib
If one in a phrenſy happen by ſome over-ſight to plead to indictment, and is put on his trial, and it appears to the court that he is mad, judge in diſcretion may diſcharge jury of him, and remit him to gaol to be tried after his recovery; but if there be no colour of evidence to find him guilty, or there be pregnant evidence to prove his inſanity at time of fact done, in favour of life and liberty, it is fit that the court proceed to trial in order to his acquittal and enlargement 35, 36
One during his inſanity commits homicide or petit treaſon, and recovers his underſtanding, and being indicted or arraigned for ſame pleads *not guilty*, he ought to be acquitted, *quia non felleo animo* 36
No difference whether phrenzy permanent or temporary, provided

vided fact be done, while party under that diſtemper *Page* 36
Madman cannot act *per electionem*, or *intentionem* 36, 37
Such inſanity as excuſeth in *homicide*, excuſeth in treaſon ib
Whether there be any exception to this rule 37
Jury may find one *non compos* either *not guilty*, or the matter ſpecially 28

Jeofails.

None of the ſtatutes extend to indictments, nor is a defective indictment aided by verdict ii. 193

Vide Amendment.

Jeſuit. Vide Felony by Statute, Religion, Treaſon.

Ignorance.

Ignorance of law or penalty excuſeth not one of age of diſcretion, or *compos mentis* from penalty of the breach of it; but in ſome caſes *ignorantia facti* excuſeth 42
Ignorantia eorum, quæ quis ſcire tenetur, non excuſat ib
Where ignorance of the perſon excuſeth in homicide ib
Jac. 1. iſſued ſeveral commiſſions of gaol-delivery, *&c.* juſtices went their circuit, *king* died, yet they proceeded, tho in ſtrictneſs of law they were determined by *king*'s demiſe, yet judges were excuſed 499
Ignorantia juris in ſome caſes excuſeth a judge, much more *ignorantia facti* ib
Receipt of felon after attainder in ſame county makes not perſon acceſſary without notice 323
Every man within vill bound to take notice of conſtable in the day, tho not in night without notice 461
Sufficient notice that a man is a bailiff by ſaying *I arreſt you* *Page* 461
Juſtices of gaol-delivery not bound to take extrajudicial notice of a ſecond commiſſion, (nor of rumours and reports) the like in caſe of a ſheriff 499
For caſes of misfortune, and caſualty falling in with the caſe of ignorance. Vide Homicide.

Impeachment.

Appeals of treaſon by particular perſons ouſted by 1 *H.* 4. impeachments by the commons frequent, becauſe rather *quaſi* grand indictments than appeals 349. ii. 150*
It is a preſentment by the moſt ſolemn grand inqueſt in the realm ii. 150*

Impriſonment. Vide Arreſt, Commitment, Juſtice of Peace.

Incapacities.

Divided and ſubdivided 15
Ordinarily no incapacity excuſes theſe perſons, that are under them, from civil actions; but *contra*, where proceedings are *ad pœnam* 16
In all caſes of infancy, *&c.* if one incapable to commit a felony be indicted by grand inqueſt, and thereon is arraigned, petit jury may either find him generally *not guilty*, or the matter ſpecially 28
Vide Coverture, Idiot, Ignorance, Infant, King, Maſter and Servant, Neceſſity, Parent and Child.
For caſualty. Vide Homicide.

Indictment.

The ſpecification of *high treaſon* conſiſts principally in this aggravation, that it is *contra ligeantiæ ſuæ debitum.* 58

Proditorie

Proditorie imports a breach of truſt owing to the *king* *Page* 59
How indictment of treaſon ſhall conclude ib
Indictment of treaſon againſt *alien amy* ſhall be laid to be *contra dominum ſuum*, and not *naturalem*, &c. but ſhall conclude *contra ligeantiæ ſuæ debitum* ib
For compaſſing death of king, queen, or prince, how treaſon and the inducement to the overt-act to be ſet forth 108
The overt-act to be ſet forth in purſuance of the treaſon alleged 108. ii. 187
Several overt-acts may be laid, and proof of any of them maintains indictment 122
An actual rebellion or inſurrection muſt be expreſt in indictment by the name of *levying war* 144
Indictment for counterfeiting *king*'s coin ought to ſhew particularly what kind of coin, but, tho uſual to expreſs the numbers, unneceſſary ii. 187
For clipping or impairing coin, &c. it muſt purſue the words of 5 & 18 *Eliz.* and conclude *contra formam ſtatuti*; and this not only in caſe of clipping foreign coin, but alſo the coin of *England* 220
Indictment muſt ſhew it was *lucri cauſâ* 328. ii. 190
Indictment againſt receiver of a traitor muſt be ſpecial of the receipt, and not generally that he did the thing, which may be otherwiſe in caſe of a procurer, counſellor or conſenter 238
All treaſon is a miſpriſion of treaſon and more; and he who is aſſiſting to a treaſon, may be indicted of miſpriſion of treaſon only 374
How indictment of *murder* ought to conclude, *Et ſic*, &c. 427 ii. 187, 188
In indictment of manſlaughter only, if others be indicted as acceſſaries *before*, indictment is void againſt them 437
If *A.* be indicted of murder, and *B.* as acceſſary *before* by procurement, and *A.* is found guilty of manſlaughter only *B.* ſhall be diſcharged *Page* 437
How indictment to be againſt perſons preſent and aſſiſting to a murder ib
Where *A.* came with *B.* to beat *C.* and *B.* beat him till he died, indictment antiently ſet forth the matter ſpecially, but now it only runs that *A.* was preſent aiding and aſſiſting 440
Indictment of murder requires theſe words, *felonicè ex malitia ſuâ præcogitatâ interfecit & murdravit*, of ſimple homicide only *felonicè interfecit* 450, 466 ii. 186, 187, 344
Implied malice, or malice in law maintains general indictment of murder 460
Where *homicide* is within 1 *Jac. of ſtabbing*, uſual to prefer two indictments; one of murder, another on the *act*, and put priſoner to plead to both, and to charge jury firſt with indictment of murder, and then with the other on the *act*, becauſe if convict on either, clergy ouſted 468. ii. 239, 240
How indictment on this *act* to be to ouſt clergy 468
It need not conclude *contra formam ſtat.* becauſe it makes not the offenſe, but ouſts clergy ib
Tho none ouſted of clergy but he who ſtabs, yet being formed on the *act* is a good indictment of manſlaughter againſt thoſe who were preſent and aſſiſting, and thereon principal in firſt degree may be convict of ſingle manſlaughter, and acquit of manſlaughter on the *act* 468, 469
In caſe of involuntary homicide, indictment may find the ſpecial matter 471
In *homicide of neceſſity* grand inqueſt may preſent the ſpecial caſe, and party be preſently diſcharged; but he may be indicted

dicted *de novo*, if matter falſe; *contra*, if indictment ſimply of murder or manſlaughter *Page* 491, 492

One indicted on corôner's inqueſt is acquitted, petit jury are to inquire of the manſlayer, which ſerves as indictment againſt him ii. 65, 300

Indictment *ſe defendendo* good before juſtices of gaol-delivery, but not of the peace. ii. 130

A. indicted *quòd primo die* Maii *ſecundo* Eliz. *apud* C. *habens in manu, &c. gladium, &c.* [*felonicè*] *percuſſit, &c.* and not ſaid *adtunc & ibidem, malè*; becauſe *day, year and place* relate only to the having the ſword, not to the ſtroke ii. 178, 179

In indictment of murder, *day and place* as well of ſtroke as other act done inducing death as of death muſt be expreſt ii. 179, 180

Indictment againſt *A.* that he *apud* N. *in com. præd.* aſſaulted *B.* of O. *in com. præd. & ipſum adtunc & ibidem cum, &c. percuſſit* nought; it cannot refer to both; and if only to one, it muſt be to the laſt, and then it is inſenſible ii. 180

Indictment of murder *cujuſdam ignoti*, good 181

No need of addition of perſon robbed or murdered, ſave for diſtinction ii. 182

Indictment charges that *J. S. fidem adhibens* to the priſoner, and *neſciens potum præd. cum veneno fore intoxicatum accepit & bibit*, and ſays not *venenum præd.* *nought*, not to be ſupplied by implication ii. 184

Indictment *quòd* A. *exoneravit tormentum, &c. verſus* B. *dans ei unam mortalem plagam*, without ſaying *percuſſit*, nought ib

So if *dedit mortalem plagam*, without *percuſſit* ib

If *A.* be indicted, *quòd* 1 Dec. *&c. apud, &c. felonicè, & ex malitiâ ſuâ præcogitatâ in & ſuper* B. *inſult. fecit, & cum quodam, &c. adtunc & ibidem percuſſit, &c.* theſe words *felonicè & ex malitiâ ſuâ* applied to the aſſault run alſo to the ſtroke, becauſe placed in the beginning of the ſentence, and done *adtunc & ibidem* *Page* 184, 185

What requiſites to indictment of murder or manſlaughter more than other indictments ii. 185 to 189

If alledged that party was killed with a ſword, and proved that he was killed with another weapon, indictment maintained; but *contra*, if with another kind of death, as ſtrangling, *&c.* 185

The kind of poiſon muſt be alledged; but if proved to be done with another kind, *bene* ib

If killing was with a ſword, it muſt be ſhewn in what hand offender held it ib

In dextrâ ſuâ, without ſaying *dextrâ manu, nought* ib

Price of weapon to be ſet down, or elſe muſt be ſaid to be *nullius valoris* 419. ii. 185

Indictment muſt ſhew in what part of body party killed was wounded, if *ſuper brachium, &c.* without ſaying right or left, *male* ii. 185

In ſiniſtro bracio, inſtead of *brachio*, inſenſible and ill ii. 186

Wound laid *circiter pectus*, ill ib

Super partes poſteriores corporis, *nought* ib

But *ſuper faciem*, or *caput*, or *dextram partem corporis*, or *infimâ parte ventris*, certain enough ib

Where length and depth of wound to be ſhewn or not ib

If in evidence it appear to be another kind of wound in another place, indictment maintained ib

Uſual to alledge deceaſed was *in pace Dei*, but unneceſſary ib

Neceſſary to alledge party died of the wound, and alſo time and place, as well of death, as the wound given, and why ib

The

The form of ſuch allegation *Page* 186
As well in indictment of manſlaughter, as murder, the ſtroke is to be alledged to be *mortalis plaga* ib
Plaga expounded ib
If indictment of murder wants *ex malitiâ ſuâ præcogitatâ*, clergy allowed ii. 187
What indictment on 21 *Jac. againſt concealing death of baſtard children by the mothers* muſt ſet forth ii. 190, 288
It need not conclude *contra formam ſtat. act* creating no new crime, but directing only the evidence ii. 289
If one be indicted and appealed before ſame juſtices for ſame murder or other felony, where there ſhall be a *ceſſet proceſſus* on the indictment; and ſo where there is an inquiſition before the coroner of murder, and returned, and likewiſe indictment for ſame offenſe by grand inqueſt ii. 221
What words neceſſary in indictment of murder to ouſt clergy ii. 344
A. indicted as having given the mortal ſtroke, *B.* and *C.* as preſent and aſſiſting, if proved that *B.* gave the mortal ſtroke, and *A.* and *C.* were preſent and aſſiſting, it maintains indictment, and all ouſt of clergy; *contra* on ſuch indictment on 1 *Jac. of ſtabbing*, he that gave the ſtroke in ſuch caſe ſhall have his clergy 437, 463. ii. 185, 292, 344, 345
Every indictment to ouſt acceſſary *before* of his clergy by 4 & 5 *P. & M.* muſt run *malitioſe*, as in murder, &c. ii. 339, 344
How indictment for robbing houſes (within 5 & 6 *E.* 6.) to be laid in order to ouſt perſons preſent and aſſiſting, but not entering, of their clergy, by 4 & 5 *P. & M.* 521, 522
How indictment laid on 5 & 6 *E.* 6. for breaking the lodgings of *A.* at *Whitehall*, (*king*'s manſion-houſe,) and taking thence ſeveral goods of *A.* and others *Page* 522, 523
How indictment to be formed on this *act* ii. 354, 362
All lodgings in *Whitehall* part of the *king*'s houſe, but in an inn of court each chamber is a ſeveral manſion-houſe, and whoſe it ſhall be ſuppoſed to be 522, 523, 527, 528, 554, 556
Indictment on 39 *Eliz.* againſt *breaking a houſe in the day* muſt preciſely, and in what manner, follow the *act* 525. ii. 170
Uſual to add *tempore diurno* to ouſt clergy ii. 179
If either indictment purſue not the *act*, or evidence maintain not indictment, priſoner to have his clergy; and on ſuch indictment may be acquitted of ſtealing againſt the *act*, and convict of ſimple felony, tho indictment conclude *contra formam ſtat.* ſo on indictment on 23 *H.* 8. or 5 & 6 *E.* 6. 525, 526, 535
Tho indictments in thoſe caſes be ſpecial, and conclude ſometime *contra formam ſtat.* yet they include felony at common law; for *contra formam ſtat.* is unneceſſary, ſo as circumſtances required by the *act* be purſued; for theſe *acts* make not the felony, but ouſt clergy 525, 535
One indicted on 39 *Eliz.* ſhall not be ouſted of his clergy by any other *act* 526
If *A.* commits larciny in a dwelling-houſe within 23 *H.* 8. and carries the goods into a foreign county, and be indicted there of larciny and convict, and jury find value of goods to be only 12*d.* tho it appear on trial in foreign county that it was within the *act*, he ſhall only have judgment of petit larciny 536
How indictment of burglary to be laid, and what words eſſential 549, 550. ii. 168, 184

How indictment of burglary shall be laid for *breaking and entring a church* with a felonious intent *Page* 556
If *A.* hires a chamber in the house of *B.* for a certain time, and it is broke open, whose mansion-house it shall be supposed ib
It shall be supposed mansion-house of owner, where lodgings of servants are broke open 557
How indictment to be laid to comprise both burglary and felony 559, 560
Where in burglary these words *eâ intentione ad furandum*, or commit some other felony are necessary 560, 561
How indictment to be for burglary, felony, and felony on 5 & 6 *E.* 6. 560
Where time of day is material to ascertain the nature of the offense, it must be exprest in indictment, as in burglary, &c. ii. 179
Indictment of burglary must be *felonicè & burglariter fregit & intravit* ii. 184
In case of burglary or robbing houses, on what statutes principal to be indicted to oust accessary *before* of his clergy 363, 364
What words in *larciny* essential 504, 508
If *A.* feloniously take my horse from me, and *B.* from him, *B.* may be indicted as of a felonious taking from me 507
Every indictment of *larciny* ought to suppose the goods stolen to be the goods of somebody 512
Quòd felonicè cepit quandam peciam panni—J. S. without saying *de bonis & catallis* J. S. *nought* ii. 182
Indictment, *quòd felonicè cepit bona ignoti, bona capellæ tempore vacationis*, or *bona capellæ in custodiâ* J. S. good 512. ii. 181
How indictment to be for stealing bells, or goods from a church ib
If *A.* have a special property in goods, as by pledge, &c. and the goods be stolen, they must be supposed in the indictment the goods of *A.* *Page* 512
If *A.* bails goods to *B.* to keep, &c. and *B.* be robbed of them, felon may be indicted for larciny of the goods of *A.* or *B.* 513. ii. 181
Indictment for stealing goods of a *feme covert, malè* 513
If goods of an intestate before administration be stolen, they shall be supposed the goods of the ordinary; or if the goods of an executor before probate be stolen, they shall be supposed the goods of the executor; neither ordinary, nor executor need shew his title 514, 515. ii. 181
But without saying *de bonis & catallis* of the executor, or ordinary, *malè* 515. ii. 181
Digging a dead body out of the grave, and stealing shroud, whose it shall be supposed ib
If *A.* put a winding sheet on the dead body of *B.* and a thief digs up the body and steals the sheet, it may be supposed *de bonis* A. 515
Indictment of *larciny from the person* how to be laid to oust clergy by 8 *Eliz.* 529
A. commits a robbery on the highway in *com.* B. of goods to value of 12*d.* only, and carries them into a foreign county, *A.* may be indicted of *larciny* in foreign county; but he must be indicted of robbery in proper county 507, 536. ii. 349
If *A.* be indicted of *larciny* in foreign county, and jury find value to be only 12*d.* he shall only have judgment of petit *larciny*, tho it appear on examination on trial, that it was a robbery 536
Larcinies committed of several things, tho at several times, and from several persons, may be joined ii. 173
Indictment, *quòd invenit quendam hominem mortuum, ac felonicè furatus est duas tunicas*, without saying

saying *de bonis & catallis cujuſdam ignoti*, ill ii. *Page* 184
Quòd cepit & aſportavit—bona & catalla B. without ſhewing what in certain, ill ii. 183
Number and value of things ſtolen to be expreſt ii. 182, 183
Where proper to uſe the word *pretii*, or *ad valenciam* ii. 183
But not material, if theſe terms, be converted ib
If one *pretii*, &c. be added to ſeveral things where it ſhould in clerkſhip be applied ſeverally, it is good, if party be convict of all; but poſſibly *contra*, if convict but of part ib
Quòd feloniè cepit 20 *oves matrices & agnos*, or *matrices & verveces*, ill; but *contra*, *if* 20 *oves* generally ib
De quatuor riſcis & ciſtis, good, becauſe *ſynonyma* ib
Quòd felonicè abduxit unum equum, nought, without ſaying *cepit*, &c. ii. 184
Quòd furatus eſt unum equum, but treſpaſs for want of *felonicè* ii. 172, 183
If a thief finding little about *A.* by menace of death force him to ſwear to fetch him a greater ſum, which he doth, a general indictment of *robbery* will do 532, 533
Violenter in indictments of *robbery* muſt be both alledged and proved 534
How indictment muſt be ib
To ouſt clergy indictment and conviction muſt be of *robbery*, *in vel prope altam viam regiam*, and not *viâ regiâ pedeſtri*, &c. 535. ii. 349
But if laid *prope altam viam regiam*, ſufficient ib
Disjunctive *in vel prope* uſual in theſe indictments, tho they ought to be certain, yet not ſubſtance, but only to aſcertain point of clergy ib
Thames alta via regia, and if it were not, yet *near it*; how indictment to be of a robbery committed in a ſhip below the bridge *Page* 535, 536. ii. 349, 350
How indictment of *piracy* to be to work corruption of blood 355
In *arſon* how indictment to be 567
A. intending to burn the houſe of *B.* thereby burns the houſe of *C.* how to be indicted 569
In *rape*, how indictment muſt be laid 628, 632. ii. 184
If one be indicted at a *leet*, *quòd felonicè rapuit*, if removed into *B. R.* he ſhall not anſwer to it as a felony, but treſpaſs ii. 172
In caſe of *eſcape*, if party hath not been indicted at time of *eſcape*, how indictment againſt *gaoler* to be, and how in the caſe of a *reſcue* where party reſcued before he was indicted 599
But if party hath been indicted and taken by *cap.* before eſcape or reſcue, how then it muſt be ib
How indictment muſt be laid in caſe of felony *for breach of priſon*, if party hath not been indicted before *breach of priſon*, and how otherwiſe 599, 607, 610
City of *London* indicted for an *eſcape*, as a miſdemeanor, which was not concluſive, but traverſable ii. 154, 155
Indictment of *forgery after a former conviction, and judgment* muſt recite the record thereof 686
If one be indicted, for that *ratione tenuræ* of certain lands he is bound to repair a *bridge*, it muſt be alledged, where thoſe lands lie ii. 181
Indictment of aſſault *in quendam ignotum*, good ib
Indictment againſt *A.* that he is *communis latro*, *champartor*, &c. *malè* 512. ii. 181, 182
But *communis barrectator*, & *pacis domini regis pertur bator*, & *litium ſeminator*, *benè*; ſo of indictment, that he is *noctivagus* ii. 182
Indictment of *barretry*, concluding *contra formam ſtat.* or *diverſorum ſtatutorum*, good, tho no direct ſtatute againſt it ii. 191

Whether in *barretry* will need be alledged . ii. *Page* 180
How indictment muſt be for *aiding a maintainer of the pope's juriſdiction* 332

General rules touching indictments.

Huſband and wife indicted of felony, ſuch indictment is joint or ſeveral, as the fact happens, and on ſuch indictment, *baron* may be acquitted, and *feme* convicted, and *è converſo* 46, 516
Whether indictment be a part or diſtinct thing from the trial 298 to 301
Variance between day in indictment of felony or treaſon, and in evidence, immaterial; yet if variance be great in point of time to avoid the danger of the relation of the attainder to the day in indictment, fit that jury find the true day 361. ii. 179
In all caſes to ouſt *clergy*, indictment and evidence muſt both bring caſe within the *act*, otherwiſe *clergy* allowed 525, 526, 535. ii. 336
Whether owner of ſtolen goods ſhall have more reſtored, than what are contained in indictment 545
Uſually at ſame ſeſſions the ſeveral indictments againſt ſame perſon are tried by ſame jury ib
Acceſſary may be indicted with principal, which is moſt uſual; but when indicted ſeverally, indictment muſt contain certainty and kind of principal felony 623
Every felony includes miſpriſion, and party may be indicted of miſpriſion only 652, 708
Where party to anſwer to a felony without indictment at *king*'s ſuit ii. 156, 149* to 152*
In all criminal cauſes moſt ſafe and regular way to proceed by indictment ii. 151*
The indorſement, *billa vera*, makes not the indictment, the bill itſelf, when affirmed, is the indictment ii. *Page* 162
Of the caption of the indictment on return of *certiorari* ii. 165
The form of the caption, and the *analyſis* thereof, *Norf. ad generalem ſeſſionem, &c.* ii. 165 to 169
Record of indictment, as it ſtands on the file of court, wherein taken, is only, *juratores pro domino rege ſuper ſacramentum ſuum præſentant*, when returned on *certiorari* is more explicit ii. 165
Name of county muſt be in margin of record, or repeated in body of caption ii. 166
Court, where preſentment made, to be expreſt ib
It muſt appear where ſeſſions held, and that place, where held is within extent of commiſſion; and therefore, if *Dorſet* in the margin and caption be *ad generalem ſeſſionem pacis tent. apud S.* and ſays not *in comitatu præd.* it is nought ib
So if weſt-riding *in comit' Eborum* be in the margin, and caption be *apud* S. *in com. præd'* it ſhall be quaſhed, becauſe not ſaid *apud S.* in weſt-riding *in com. præd.* ib
How many juſtices to be named, but reſt may be ſupplied by the words *(& ſociis ſuis, &c.)* ib
How title of their authority to be ſet forth, as *juſtic. ad gaolam, &c.* ib
If there be a ſeſſion by three commiſſions, as of *gaol-delivery, &c.* if it be returned at a ſeſſion holden before them, and record be made up, as on all three commiſſions, if they have juriſdiction to take indictment but by one, it is good, tho not enabled to take it by the other ib
Where return muſt mention any, and which of the juſtices to be of the *quorum*, or not ii. 167
Where caption faulty in form, ſame term it may be amended by

by clerk of aſſiſes, or peace, but not in another term ii. *Page* 168
In another term clerk, that returns it, ſhall be fined for his informal return ib
Indictment deſcribed ii. 169
Latin a fixt regular language ib
Falſe *Latin* did not vitiate indictment ib
But words of art by omiſſion, or miſplacing letters becoming inſenſible vitiate ib
Of *inſenſible and incertain words* ii. 170
Where verb of *ſingular number* is uſed for a *plural*, indictment ſhall be quaſhed ib
Of *abbreviations*, and where conſtrued to beſt advantage for maintaining indictments ib
Figures not allowed in indictments, tho ſometime *literal numbers* be in returns ib
Indictment grounded on offenſe by ſtatute muſt bring it within ſubſtantial deſcription of it; otherwiſe *contra formam ſtat.* will not ſupply it ii. 168, 192, 193
If offenſe be made felony, or otherwiſe penal by *act*, and by proviſo in ſame, or any ſubſequent *act* ſome caſes are exempted out of it, indictment need not qualify the offenſe, ſo as to exempt it out of the proviſo; but party ſhall have advantage of it by pleading *not guilty*, or in ſame manner ſhall have advantage of the ſubſequent ſtatute by 21 *Jac.* ii. 170, 171
If *act* be prohibitory, and by a ſubſtantive clauſe gives a recovery of penalty by action of debt, but is ſilent as to indictment, party may be indicted on prohibitory clauſe, and thereon fined, but not to recover penalty, but fine ought not to exceed it ii. 171
But if *act* be not prohibitory, but only if any ſhall do ſuch a thing, he ſhall forfeit 5*l.* to be recovered by action of debt, &c. but mentions nothing of indictment, he cannot be indicted for it ii. *Page* 171
If one be indicted for offenſe, which was at common law, and indictment concludes *contra formam ſtat.* but in truth is not brought within the *act*, it ſhall be quaſhed ii. 171, 172
One indicted for *arſon*; on *not guilty* pleaded, a ſpecial verdict was found, which was adjudged no felony; on ſame indictment he was adjudged to pillory, &c. *ſed quære*, for being tried for felony, he had not thoſe advantages for his defence, as if indicted for treſpaſs ii. 172
A particular ſtatute muſt be recited and proved by examined copy ii. 172, 192
All penal *acts* inducing a forfeiture to the *king*, or making a felony or treaſon are general *acts* ii. 172
A general *act* need not be recited, but it is ſufficient to conclude *contra formam ſtat. in hujuſmodi caſu edit. & proviſ.* but if miſrecited, court takes notice of true ſtatute, and rejects miſrecital as ſurpluſage ii. 172, 173
But if recited, and miſrecited in a point material, and concludes *contra formam ſtat. præd.* it is fatal, and indictment quaſhed ii. 172
Where *act* is repealed and re-enacted, or continued to the end of next ſeſſion, and before it is continued over, how indictment to conclude as to *contra formam*, &c. 667, 706. ii. 173
Where one *act* relates to another, as where former makes offenſe, latter adds a penalty, how indictment to conclude ii. 173
If one offender, and *ſeveral* capital offenſes be committed by him, they may be joined in one indictment ib
If *ſeveral* offenders commit one offenſe, tho in law they are ſeveral offenſes, yet they may be joined ib

So if offenſes be of *ſeveral* degrees, but dependent one on another, as in the caſe of principal in firſt degree, and principal in ſecond degree, and acceſſary *before* or *after* ii. *Page* 173

Where joint indictments for *ſeveral* offenſes of ſame nature diſtinctly committed by *ſeveral* offenders have been held ill, or not ii. 174

Where *divers* perſons are inſerted in one indictment, the word *ſeparalitèr* makes them ſeveral ib

The *grammatical order* of the ſeveral parts of an indictment ii. 174, 175

If day be inſerted, and not year, nought, and ſhall not be ſupplied by intendment of *(ult. præterito)*, unleſs ſo expreſt; but if ſo, ſufficient to aſcertain year by day of ſeſſions ii. 177

Seſſions held 20 *May*, offenſe ſuppoſed on 10 *of May laſt paſt*, it ſhall relate to *day*, and not *month*, and ſo for the words *next enſuing* ii. 178

One indicted, that he *in feſto Sancti Petri*, &c. ill, becauſe two feaſts of that name ib

Indictment, *quòd primo die* Maii, &c. *in quendam* B. *inſult. fecit, & ipſum verberavit*, and ſays not *adtunc & ibidem verberavit*, good; *vi & armis*, *day and place* named in beginning refer to all enſuing *acts*; but *contra* in felony, there muſt be *adtunc & ibidem* to the ſtroke, or the robbery, &c. and day and place of aſſault inſufficient ib

If ſaid that defendant on 1 and 2 of *May* made an aſſault, and felonioufly took, &c. ill, becauſe incertain, to which day felonious taking relates ib

Uſual to repeat *adtunc & ibidem* to the ſeveral parts of fact charged ii. 178, 180

Regularly *vill, or hamlet and county* muſt be expreſt ii. 180

Where time muſt be repeated, regularly, place muſt be ſo too ii. *Page* 180

Suff. in the margin, indictment ſuppoſing fact to be done *apud* S. *in com. præd.* ſufficient; but *contra*, if another county be mentioned in the addition of any party, &c. ib

Indictment not aided by verdict; none of the ſtatutes of jeofails extends to them ii. 183, 193

What is defect of certainty in a count, is much more ſo in indictment ii. 183

Indictment of felony muſt alledge fact to be done *felonicè*, of treaſon *proditoriè*, of petit treaſon, *felonicè & proditoriè* 59. ii 184, 187

Felony or treaſon at common law was laid to be done *vi & armis*, but now unneceſſary by ſtatute 187

So are the words *gladiis*, *baculis & cultellis* ib

Regularly every indictment ought to conclude *contra pacem*, but need not conclude *contra coronam & dignitatem ejus* ii. 188

Concluding *contra pacem*, and ſaith not *domini regis*, is inſufficient ib

Why indictments conclude *contra pacem*, &c. 130

For offenſe ſuppoſed to be committed in time of former *king*, and concludes *contra pacem regis nunc*, nought ii. 188, 189

One indicted in time of one *king contra formam domini regis nunc*, may be arraigned for that offenſe in the time of his ſucceſſor ii. 189

Indictment not diſcontinued by demiſe of the *king* ib

If the offenſe be ſuppoſed to be begun in the time of one *king*, and continued in the time of his ſucceſſor, it muſt conclude *contra pacem* of both kings ib

If an offenſe be alledged in the time of one *king*, and indictment taken in the reign of the ſucceeding *king*, and concludes *contra pacem nuper regis, & regis nunc* good

good; *regis nunc* ſurpluſage ii. *Page* 189
Where indictments ſhall conclude *contra formam ſtatuti*, or *ſtatutorum*, or not, and where only ſurpluſage 468, 561, 667. ii. 189 to 194
If an offenſe be at common law, and alſo prohibited by ſtatute with a corporal, or other penalty, party may be indicted at common law; and if it conclude not *contra formam ſtat.* it ſtands only as indictment at common law, and he can receive only the penalty the common law inflicts ii. 191, 192
Great ſtrictneſſes required in indictments, the reproach of the law, *&c.* ii. 193
Rare to take any exceptions to indictments before conviction, ſave on indictments removed into *B. R.* by *certiorari*, which *B. R.* may in diſcretion hear or not hear, but remand priſoner and indictment ii. 237
If exceptions to an indictment appear material, court can quaſh that, and direct a new bill to be ſent to grand jury, wherein faults may be amended, and priſoner arraigned *de novo* ib
One attaint by outlawry ſhall not be indicted till outlawry reverſed ii. 252
For what cauſes indictments abated. Vide Abatement.
Where beſt to arraign priſoner on indictment, or coroner's inqueſt, or both, and for other matters. Vide Arraignment.
Where offender indictable. Vide County.
What evidence maintains indictment. Vide Evidence.
What the quality of indictors. Vide Jury.
For indictments in leets and torns. Vide Leet, Sheriff.

Infant.

Wherein the *civil* and *common law* agree, or differ with reſpect to the full age of a man *for making contracts, being a procurator or executor, or conſenting to marriage* *Page* 17, 28
As to crimes, into what periods *civil law* diſtinguiſheth the ages, and at what age it preſumeth men *capaces doli*, or not 18, 19, 20
Both civil and common law leave the queſtion, whether party *capax doli*, or not, *ad arbitrium judicis* on the circumſtances, and with what caution 18
By common law, as to offenſes not capital, in ſome caſes infant is privileged by his non-age; and herein privilege is all one, whether above fourteen or under, if he be under twenty-one years; but with ſome and what differences 20
Infant convict of riot, *&c.* ſhall be fined and impriſoned, and not be privileged barely becauſe under twenty-one; but court *ex officio* on his trial ought to examine, whether he is *doli capax*, and had diſcretion to do the act wherewith he is charged ib
But if offenſe charged be a mere non-feaſance, (unleſs of ſuch a thing as he is bound by tenure, or the like to do, as to repair a bridge, *&c.*) there in ſome caſes he ſhall be privileged by his non-age, if under twenty-one, tho above fourteen; becauſe *laches* in ſuch caſe ſhall not be imputed to him ib
If infant in *aſſiſe* vouch a record, and fail at the day, he ſhall not be impriſoned; and yet *Weſtm.* 2. that gives impriſonment in ſuch caſe, is general ib
If *A.* kills *B.* and *C.* and *D.* are preſent, and attach not offender, they ſhall be fined and impriſoned; but if *C.* within twenty-one, he ſhall not 21. ii. 75
Where corporal puniſhment is but collateral, and not direct intention of proceeding againſt infant for his miſdemeanor, there in many

many cafes infant under twenty-one ſhall be ſpared, tho poſſibly puniſhment by ſtatute *Page* 21. ii. 75

If infant of eighteen be convict of *diſſeiſin* with force, he ſhall not be impriſoned, and yet *feme covert* ſhall ib

If infant be convict in action of treſpaſs *vi & armis*, the entry ſhall be *nihil de fine, ſed pardonatur, quia infans*; if a *capiatur* be entered, it is error, for it appears judicially, to court, that he was within age, when he appears by guardian, nor ſhall he be *in miſericordiâ pro falſo clamore* ib

General ſtatutes, that give corporal puniſhment, extend not to infants ib

But where a fact is made felony or treaſon, it extends as well to infants, if above fourteen, as others 21, 22

Civil law uncertain in defining *ætas pubertati proxima*; but laws of *England*, antiently determined it to be twelve years for both ſexes; under that age none could regularly be guilty of a capital offenſe, and above that age he might, or not, according to circumſtances, that might induce court or jury to judge him *doli capax, vel incapax* 22, 23, 24, 515

Infant of twelve compellible to take oath of alligeance 23

Againſt infant under twelve proceſs of outlawry on indictment was not awardable; and if awarded, error; but if above that age, ſuch proceſs was awardable 23, 24

If infant under twenty-one ſhall confeſs indictment, court ought not to record it, but put him to plead *not guilty*, or at leaſt inquire by inqueſt of office of truth of fact 24, 27, 491, 492

How the law now is with reſpect to infants and their puniſhments 25 to 29

Infant above fourteen and under twenty-one is equally ſubject to corporal puniſhments, as well as others of full age, for it is *præſumptio juris*, that after fourteen they are *doli capaces* *Page* 25

A lad of ſixteen convict of ſucceſſive wilful burning three dwelling-houſes, &c. had judgment to die, and was executed ib

Fourteen years common ſtandard, at which both males and females are ſubject to capital puniſhments for offenſes committed by them at any time after that age 25, 26, 28

Infant under fourteen, and above twelve, is not *primâ facie* preſumed *doli capax*, and therefore regularly for a capital offenſe committed under fourteen is not to be convicted, but may be found *not guilty*, or jury may find ſpecially, and how; in which caſe court ought to diſcharge him, becauſe no felony 26 to 29

Yet if it appear to the court that he was *doli capax*, when offenſe committed, he may be convicted and ſuffer death, tho he hath not attained *annum pubertatis*, *viz.* fourteen 26, 434, 569, 570

Infant [ten years old] that had killed his companion, and hid himſelf, hanged; *malitia ſupplet ætatem* 26

A girl of thirteen burnt for petit treaſon ib

If infant be above ſeven, and under twelve, and commit a felony, he is *primâ facie* to be judged *not guilty*, and found ſo, becauſe ſuppoſed not of diſcretion to judge between good and evil; yet in that caſe, if it appear by pregnant evidence that he had ſuch diſcretion, judgment of death may be given againſt him 26, 27

Infant of nine killed infant of like age, he confeſt felony, and on ex-

examination found he hid the blood and body; held he ought to be hanged *Page* 27
Circumſtances to be inquired of by jury ib
If convict, court cannot *ex officio* diſcharge infant ib
If infant be *infra ætatem infantiæ, viz.* ſeven years, he cannot be guilty of felony, whatever circumſtances proving diſcretion may appear, for *ex præſumptione juris* he cannot have diſcretion and no averment ſhall be received againſt it 27, 28
As to matters of crime, females have ſame privilege of non-age, as males 28
If infant be firſt arraigned and acquitted on indictment of murder by grand inqueſt, he may plead that acquittal on arraignment on coroner's inqueſt, and that will diſcharge him 28, 29
Infant under fourteen preſumed unable to commit a rape, but preſent and aſſiſting therein may be a principal 630
Act making offenſe felony binds not one under fourteen 706

Informations.

11 *H.* 7. gave power to proceed in all penal ſtatutes by information before juſtices of *aſſiſe* and peace, treaſon, murder, and felony excepted ii. 151*
Ill uſe being made of it, repealed ib
Tho informations are often practiſed in the crown-office in caſes criminal, and by many penal *acts* the proſecution is by the *acts* themſelves to be by bill, plaint, information, or indictment, yet proſecution in capital caſes is ſtill to be by indictment; except in caſes excepted, which ſee ii. 156 to 152*
In all criminal cauſes the moſt regular and ſafe way, and moſt conſonant to *magna charta*, is by preſentment or indictment, of twelve ſworn men ii. *Page* 151*
37 *H.* 8. for curing omiſſion of the words *vi & armis, gladiis, &c.* in indictments, extends not to informations ii. 187

Inqueſt of Office.

If jury find one, whom they acquit of treaſon or felony, fled; they muſt inquire what goods he had; but this only an inqueſt of office, and traverſable by party, or thoſe who have the goods 362 414, 493. ii. 154, 301
Where in caſe of inqueſt of office jurors not finding according to evidence have been fined ii. 311
Where court may inquire ex officio, *whether priſoner be of years of diſcretion.* Vide **Infant.**
Whether he be compos mentis. Vide **Idiot**, &c.
Where one ſtands mute ex viſitatione Dei, *or* ex malitiâ. Vide **Mute.**
Vide **Coroner** *per totum.*

Inquiſition of Death. Vide **Coroner, Felo de ſe.**

Intention.

To be tried by circumſtances 229 429, 508, 509
In caſes of larciny what are circumſtances evidencing a felonious intent 509
Antiently, tho not now, *voluntas reputabatur pro facto* 532
If primary intention be to beat, tho killing may be the effect, yet it is not ſuch felonious intent as makes burglary 561

Ireland.

Of the laws *there* of treaſon 147
Ceſſing of ſoldiers expounded; treaſon by 18 *H.* 6. ib.
It was chief treaſon charged on *earl of Strafford king*'s lieutenant *there*, what his defenſe ib

By 10 *H.* 7. in *Ireland (Poining's law)* all ſtatutes of *England* are enacted to be obſerved *there* *Page* 147
25 *E.* 3. declaring treaſons, and 1 *H.* 4. enacting, that nothing ſhall be treaſon, but what is within that *act*, treaſons enacted *there tempore H.* 6. and afterwards before 10 *H.* 7. ſeem not to be repealed ib
General introduction of ſtatutes of *England*, being an affirmative law cannot be intended to take away thoſe *acts*, which were made in *Ireland* for declaring treaſon, as 18 *H.* 6. ib
Act for *earl of Strafford*'s attainder juſtly repealed, and why ib
Tho part of the dominions, yet no part of the realm of *England* nor *infra quatuor maria* 155, 317, 693
Ireland hath ſame laws for treaſon that *England*, and ſome more, yet for treaſon in *Ireland* offender may be tried in *England* by 35 *H.* 8. 155
A *peer* there tried *here* for treaſon by a common jury 155, 317, 693

Judgment.

Court *ex officio* to give judgment for *treaſon*; but if *king*'s ſerjeant or attorney prays it, how prayer to be entered 396
The form of ſevere judgment for *high treaſon* 350, 351, 382 ii. 396, 397
King often pardons all, but beheading, under great ſeal, *&c.* 351, 370. ii. 412
Women to be *drawn and burnt*, as well in *high* as *petit treaſon* 351. ii. 397, 399
Form of leſs ſolemn judgment which is only to be *drawn and hanged* 351. ii. 397
But women to be *drawn and burnt* 351
For *counterfeiting great or privy ſeal, or privy ſignet, or ſign manual* *Page* 187, 351, 352. ii. 398, 399
For *counterfeiting or clipping, waſhing*, &c. *king*'s *coin, or foreign coin made current* 219, 220, 223 224, 351 to 354. ii. 397, 398
For *knowingly importing falſe money* ad inſtar *the king's coin, with intent to merchandize*, &c. 220
In new treaſons it is to be the moſt ſevere judgment; but *contra* as to *coin* 220, 221, 352, 353. ii. 396, 397
What the conſequents of judgment in *treaſon* 354
In *high treaſon* marſhal is mentioned as officer, by whom execution is to be made, in the very judgment in *B. R.* ii. 411
Judgment of *treaſon* given by the lords *per aſſent du roy* as a tranſcendant puniſhment of the murder of the *duke of Glouceſter* 266, 267
There may be reaſons not only in policy, but juſtice, ſometimes for a parliament to vary the puniſhment of crimes, in ſubſtance the ſame, when differenced by circumſtances 270
Judgment for miſpriſion of treaſon 374. ii. 400
For *petit treaſon* 382. ii. 399
A wife or ſervant acceſſary *before* to *petit treaſon*, judgment to be as againſt principal 379
But if acceſſary, whether *before* or *after*, be a ſtranger, judgment, ſhall be *quòd ſuſpendatur*, *&c.* 382
Judgment of *peine fort & dure*, where priſoner challenges thirty ſix in *petit treaſon*, as well in appeals as indictments, and in caſe of men, as well as women ii. 319, 399, 400
Miſpriſion of petit treaſon puniſhable by fine and impriſonment; ſo is *miſpriſion of felony* 375
Judgment in all caſes of *felony*, *quòd ſuſpendatur per collum, quoad que mortuus fuerit* ii. 39

What

What judgment by *Weſtm.* 1. *in miſpriſion of felony*, if concealer an officer, as ſheriff, *&c.* or if a common perſon *Page* 374, 375
If jury in caſe of indictment for *murder* or *manſlaughter*, find the *homicide* to have been *involuntary*, *& ſic*, *&c.* court may give judgment againſt concluſion of verdict, as that the fact is *manſlaughter*, tho verdict conclude *per infortunium*, or *ſe defendendo* 471
Where thief is killed of neceſſity in purſuit, if ſpecial matter be found, the killer ſhall have judgment, *quod eat inde ſine die*, becauſe it is no felony, nor cauſeth any forfeiture, ſo much as of goods, and ſo differs from *ſe defendendo*, or *per infortunium* as to forfeiture of goods ii. 304
One indicted of *homicide ſe defendendo*, or *per infortunium* muſt plead to it, or confeſs it, and no other judgment, but *remittitur priſonæ*, or he is bailed *ad expectandam gratiam regis* ii. 395
If one by coroner's inqueſt be found to have killed a thief aſſaulting to rob him, *&c.* he ſhall not be arraigned on that indictment, but be diſmiſt without any judgment ib
If one be indicted of *murder* or *manſlaughter*, and on *not guilty* ſpecial matter is found, judgment is, *quòd eat inde quietus*, which is a perpetual bar; but if found guilty *ſe defendendo*, judgment is, *quòd expectet gratiam regis* ii. 395
Judgment in *grand* and *petit larciny* 504, 530. ii. 400
In *theft-bote* ii. 400
Judgment of *peine fort & dure*, and how entered ii 319, 399, 400
How judgment in caſe of *allowance of clergy* entered ii. 395
How a *peer* muſt aver his peerage, and pray benefit of 1 *E.* 6. and how judgment for his deliverance ſhall be entered ii. 396
If it be alledged that priſoner is a clerk in orders, how judgment ſhall be entered after his reading; and the like, if he plead *king's* pardon of burning in the hand ii. *Page* 396
If a *layman* pray his clergy, and it appear on record that he had it before, how the entry is ib
And ſo if he prays his *clergy*, and cannot read ib
Where judgment on *acquittal* is only *quòd eat inde ſine die*, and there is defect in indictment, it ſhall be ſuppoſed to be given on that defect ii. 248
Judgment of *eat inde ſine die*, general and ſpecial ii. 392
In *covenant* a ſpecial verdict is found, and on peruſal of declaration a fault therein appears, how judgment ſhall be, ſo as not to be a bar in another action ii. 393
If given generally, it ſhall be intended on verdict and merits ib
In a *quare impedit* by the *king* iſſue is joined, and found for defendant, it is alledged in arreſt of judgment that no patron is named in the writ, judgment ſhall be entered generally, *quòd eat inde ſine die*, and not ſpecially on plea in abatement; but it ſhall not bar the *king* in a new action, for the *eat ſine die* ſhall be applied to the plea to the writ ib
If one plead in bar to indictment yet, if indictment inſufficient, whether *eat ſine die* ſhall be applied to inſufficiency of indictment, or to plea in bar ib
Fit to have the *eat ſine die* ſpecial in that caſe, and how ib
If one plead *not guilty*, and be acquitted, judgment is not only *quòd eat inde ſine die*, but *ideo conſideratum eſt*, *quòd eat inde quietus*, tho at *king's* ſuit ii. 394
If entry be *quòd eat inde quietus*, priſoner cannot be arraigned again, tho indictment inſufficient, till judgment of acquittal reverſed,

reverſed, becauſe it muſt go to matter of the verdict ii. *Page* 394, 395
Where priſoner excepts to inſufficiency of indictment, or court doth it *ex officio*, how judgment to be ib
Judgment on *auterfoits acquit convict* or *attaint*, and confeſſion by *king*'s attorney, how to be entered ii. 392
How judgment entered on *plea of pardon*, and how *allowance* thereof entered in the margin ii. 391 392
One outlawed of *felony or treaſon*, tho no other judgment but *utlegatum eſt per judicium coronatorum* is of itſelf an attainder, and ſubjects offender to ſuch award thereon to be made by court, as is ſuitable to the offenſe ii. 399
Judgment *quòd ſuſpendatur*, &c. to be given, as well againſt a *peer*, as another, in caſe of *felony*, and cannot otherwiſe be given by court, or executed by ſheriff ib
Tho judgment regularly againſt the *king* is *falvo jure regis*, yet *contra* in caſe of life ii. 247
Former *acquittal by judgment* not only a bar of new indictment for ſame offenſe; but if party is indicted *de novo*, and outlawed thereon, he may aſſign his former *acquittal* for error in that outlawry, and reverſe it for that cauſe, and in that caſe how judgment to be ii. 243, 244
Theſe words, *Eyt judgement de vy & member* in an *act* create a felony 627, 641, 703
Court may reſpite judgment on *acquittal*, if againſt full evidence ii. 310
In *England* law more determinate than in other places, and leaves as little as may, to *arbitrium judicis* 13
It doth not allow an arbitrary power to the judge to change puniſhment law inflicts 19
Thorp, C. J. was ſentenced to death before ſpecial commiſſioners aſſigned *ad judicandum ſecundum voluntatem regis*, in reſpect of the oath made by him to the *king* and broken, whereby he had bound himſelf to that forfeiture, that judgment was affirmed in parliament, but with what caution to prevent ſuch arbitrary courſe of proceeding for the future *Page* 262, 263
One indicted of *arſon* pleaded *not guilty*, and a ſpecial verdict was found, and ſpecial matter adjudged, no felony; yet on ſame indictment priſoner adjudged to the pillory; *ſed quære* ii. 172
One indicted of felony before juſtices of *oyer* and *terminer*, &c. is convict, if record of conviction and priſoner be removed into *B. R. B. R.* may give judgment thereon, but what to be done previouſly thereto ii. 401, 404
No other remedy before 11 *H.* 6. & 1 *E.* 6. for judgment to be given on perſons reprieved before judgment 401
Where priſoner hath not always from his arraignment remained in cuſtody of court, where he firſt had judgment, but is brought in by *cap.* by ſheriff, he ſhall not be eſtopped from ſaying *he is another perſon*, and iſſue may be taken thereon, and ſhall be tried before execution awarded; and if he ſtand *mute*, it ſhall be enquired *ex officio*, whether of malice ii. 402, 407
But *contra*, if in cuſtody of ſame court from his firſt arraignment, or if he had been bailed, and came in and rendered ib
Where party outlawed or abjured comes by proceſs into *B. R.* he ſhall be demanded what he can ſay why execution ſhould not be awarded on record removed; and if he confeſs himſelf, *ſame perſon*

perſon, execution ſhall be awarded ii. *Page* 402, 407
By 14 *H.* 6. juſtices of *niſi prius* on tranſcript of record have power to give judgment and award execution; but then priſoner muſt be ſent by *habeas corpus* to ſheriff of county, where *niſi prius* is, or elſe ſhall be bailed to appear *there* ii. 403, 404
But they may return *poſtea* into *B. R.* and there judgment may be given, as at common law ii. 404
In what caſes execution ſhall not be awarded without demanding what priſoner has to ſay againſt it ii. 401, 407, 408
Form of award of execution in *B. R.* ii. 409, 411

Vide **Corruption and Reſtitution of Blood, Execution and Reprieve, Forfeiture, Gaol-delivery, King's Bench, Oyer and Terminer.**

Juriſdiction.

Where temporal judge may incidently take notice, whether a tenet be *hereſy*, or not 400, 407 408
Interpretation of a ſtatute belongs to common law 408
Juſtices of *C. B.* cannot hold plea on indictment or appeal in capital cauſes 498
Where proceedings of judges in capitals without ſtrict extent of their commiſſion, or where their commiſſion happens to be determined, are great miſpriſions 498, 499
Altho felony be limited to ſpecial juriſdiction, yet miſpriſion of it may be tried by a common jury and before general commiſſioners of *oyer* and *terminer* 653
A juſtice of peace of county where fact done, cannot in foreign county do any *act* of juriſdiction, as impriſon, but what he may do *Page* 581. ii. 50, 51

Vide **Admiralty, Arreſt, Commiſſion, Court, Gaol-delivery, Homicide, Juſtice of Aſſiſe, Juſtice of Peace, King's Bench, Murder and Manſlaughter.**

Jury.

Grand Jury.

Special proviſion made for quality of indictors in *Lancaſhire* 286 ii. 52*
So in caſes of murders, *&c.* committed in *king*'s palace ii. 53*
Of grand inqueſts before juſtices in *Eyre* ib.
On ſummons of a ſeſſion of the peace, form of precept for return of grand jury; a *ſcire facias* alſo iſſues to all coroners, conſtables, *&c.* to be there at that day 154*
According to others, a *venire facias* iſſues to ſummon grand jury. *Vide* the form ib
On commiſſions of *oyer* and *terminer*, or *gaol-delivery*, form of like *venire* ib
On this precept ſheriff returns twenty-four or more out of whole county, *viz.* a competent number out of every hundred, out of which grand inqueſt of ſeſſions of peace, *oyer* and *terminer*, or *gaol-delivery* are taken and ſworn *ad inquirendum*, *&c.* not as antiently in *Eyre*, which was a kind of grand inqueſt out of every hundred ib
In ſome counties which conſiſt of gildable and ſuch franchiſe, where antiently ſeveral juſtices of *gaol-delivery* ſat, as in *Suffolk*, there are two grand juries, one for the gildable, another for the franchiſe ib
Indictors to be *probi & legales homines*, and muſt be ſo returned;

and this holds, as well in coroner's inquests, as other indictments or presentments ii. *Page* 155*, 167

If any of them be outlawed, tho in a personal action, it is pleadable in avoidance of indictment 303. ii. 155*

Who not *probi & legales homines*; where one is not *legalis homo*, tho twelve beside without exception, indictment may be quashed by plea ii. 155*, 167

They must be *king*'s *liege* people ii. 155*

And must be returned by sheriff or bailiffs of franchises, without nomination of any, save by sworn bailiffs ib

All indictments taken contrary, void ib

What freehold indictors ought to have ib

By statute how justices of *gaol-delivery*, or peace, (one of *quorum*) in open sessions may reform pannel of grand jury ii. 36, 155*, 156*

Grand jury sworn first day commonly serves whole sessions of peace, *&c.* yet court may grant another grand inquest to be returned and sworn, and in what that may be ii. 156*

If on record it appear that grand inquest was returned after first day of sessions, unless adjournment be entered on record, it is erroneous ib

By statute grand inquest may be impannelled to inquire of concealment of another grand inquest, and tho it mentions only a grand inquest to be returned by justices of peace, yet it extends to *B. R.* and possibly to sessions of *oyer* and *terminer*, and *gaol-delivery*; tho that can rarely come in question, because sessions of peace ordinarily accompany those commissions ii. 156, 157, 160

This proper way of punishing grand inquest, if they refuse to present such things as are within their charge ii. *Page* 157

Grand inquest before justices of *gaol-delivery*, *&c.* ought only to hear evidence for the *king*, and in case of probable evidence ought to find the bill, and why, *(sed quære)* ib

Where they may return the bill *ignoramus* ib

If it appear that *A.* was killed by *B.* and a bill of murder be presented, regularly they ought to find the bill for murder, and not for manslaughter, *&c.* and why 491, 492. ii. 158

If a bill be against one for murder, and grand inquest on evidence before them, or their own knowledge be satisfied, that it is but *per infortunium* or *se defendendo*, and accordingly return bill specially, court may remand them to consider better of it, or hear evidence at the bar, and accordingly direct grand inquest ii. 158

A judge blamed for fining grand inquest for such a return ib

If a bill be for murder, and it doth *constare de personâ occidentis*, whether they can find bill for manslaughter, and *ignoramus* for the murder, and whether court be bound to receive such a return ii. 158 to 162

Whether they can be fined for such a return ib

If evidence to grand inquest be given at the bar on indictment in *B. R.* and grand inquest will not find a bill according to direction of that court, in what instance they are fineable ib

If justices of *oyer* and *terminer*, or *gaol delivery*, having heard evidence at bar, grand inquest will not find according to their directions, justices may bind them over to appear in *B. R.* and on information against them, they may be fined, *(sed quære)* ii. 160

Fines set on them by justices of peace, *oyer* and *terminer*, and gaol-

gaol-delivery for concealments or non-preſentments in any other manner than that preſcribed by 3 *H.* 7. not warrantably by law ii. *Page* 160
Progreſs of fines ſet on juries, firſt on grand inqueſts, then on petit juries for not finding according to direction of court, and then on jurors, in civil cauſes for not finding in point of fact according to court's direction ii. 160, 311
Objections againſt ſetting ſuch fines ii. 160, 161
Grand jury ſworn to keep *king*'s council undiſcovered; diſcloſing whereof was formerly felony, which is now only fineable ii. 161
If thirteen or more be of grand inqueſt, a preſentment by leſs than twelve ought not to be; but if there be twelve aſſenting, tho ſome of the reſt of their number diſſent, it is a good preſentment ib
But on trial by petit jury, it can be by no more or leſs than twelve, and all aſſenting to the verdict ib
If preſentment be delivered into a court of ſeſſions and received, no averment lies, that it was not aſſented to by twelve ii. 162
Contra, in caſe of preſentment by a leet, for party diſtrained may ſo aver ib
Why indictors preſumed to be indifferent ib
A good exception, that one procured himſelf to be returned on grand inqueſt ib
If bill be for murder, and they return it *billa vera quoad* manſlaughter, and *ignoramus quoad* murder, what words it is uſual to ſtrike out in preſence of grand jury, and ſo to receive bill ib
What ſafeſt way with reſpect to this and like caſes ib
Indorſement makes not indictment, but bill affirmed ib
Difference between preſentment by grand jury of county and a liberty ii. 167, 168
Indictment of *aliens* to be by grand inqueſt of *Engliſh* ii. *Page* 271
In what county party indictable. Vide **County.**
Vide **Indictment, Preſentment.**

Petit Jury.

By 27 *Eliz.* precedent of *commiſſion to give judgment without trial by jury* primæ impreſſionis 336
In dubiis rather to incline to acquittal than conviction; caution againſt the wit and invention of accuſers, and odiouſneſs of the accuſed 87, 300, 509, 636
Not to be tranſported with heinouſneſs of the offenſe 636.
Uſually at ſame ſeſſions the ſeveral indictments againſt ſame perſons tried by ſame jury 545
Jurors triers of credit of witneſſes, as well as truth of fact 635. ii. 235, 276, 277, 313
After *not guilty* received and recorded, ſheriff returns pannel of jury ii. 293
Oath of jury ib
The form of charge given by clerk to jury; containing the effect of their inquiry ii. 294
Tho there be twenty priſoners at the bar for ſeveral felonies, and the oath is general to try between *king* and priſoner at the bar, yet jury to inquire of no more than what particularly charged with; and tho twenty have pleaded and ſtand at the bar, when jury is ſworn, yet court may ſtay at any number, and jury ſtand charged with no more ib
When they go from the bar, and have brought in their verdict, then if ſame jury paſs on the remaining priſoners, yet they are to be called over again, and reminded of their challenges, and jury ſworn *de novo* on their trial ib

By antient law, if jury ſworn had been once particularly charged with a priſoner, it was commonly held they muſt give up their verdict, and they could not be diſcharged before ii. *Page* 294

Yet contrary courſe hath long obtained ii. 295

Where court may diſcharge jury ſworn, and charged to try one *non compos* 35

If after jury ſworn and departed from bar, one wilfully goes out of Town, the eleven cannot give any verdict without the twelfth; but twelfth ſhall be fined for his contempt; and that jury may be diſcharged, and new jury ſworn, and new evidence given, and verdict taken of new jury ii. 295, 296, 309

If a jury be charged with ſeveral priſoners, and court finds jury partial to one, court may diſcharge jury of that priſoner, and put him on his trial by another jury ii. 296

Twelve ſworn to try the iſſue; after departure *A.* one of them leaves his companions; by conſent of all parties *B.* another of the pannel is ſworn in *A*'s place, *A.* returns, and being examined, *why he departed*, anſwered to *drink*, and denied, on oath, that he had ſpoken with defendant; whereon *B.* was diſcharged, and verdict taken of *A.* and the other eleven, and *A.* fined for contempt ib

If thirteen be ſworn by miſtake, ſwearing of laſt is void, and the other twelve ſhall ſerve ib

No verdict can be taken of leſs than twelve, and it is error; and ſo in a preſentment; but if twelve be recorded ſworn, no averment lies that one was unſworn ib

Court at common law may on juſt cauſe remove a juror after ſworn ib

When jurors depart from the bar, a bailiff ought to be ſworn to keep them together, and not to ſuffer any to ſpeak with them ii. *Page* 296

After their departure they may hear one of the witneſſes again in open court, and may deſire to propound a *queſtion* to the court for their ſatisfaction; and it ſhall be granted, ſo it be in open court; but if otherwiſe, this appearing by examination in court, and indorſed on *poſtea* will avoid the verdict ii. 296, 307

If they agree not before departure of juſtices of *gaol-delivery*, they muſt be conveyed along in carts, and judge may take and record their verdict in a foreign county; *quære*, whether in ſuch caſes, the ſeſſion may be adjourned before verdict taken ib

If there be eleven agreed, and but one diſſenting, who ſays he will rather die in priſon than conſent, yet verdict ſhall not be taken by eleven, nor refuſer fined or impriſoned ib

For moſt part in *Eyre* petit jury were all of ſame hundred where offenſe done; but now jury that tries, as well as inquires is generally of reſt of county ii. 301

Any of the jury eating or drinking before they have given up their verdict, fineable ii. 297, 306

But antiently, if at charges of either party, verdict ſet aſide, but not ſo now ib

If at charges of priſoner, afterwards found guilty, verdict ſtands ib

But if they acquit him, judge before whom verdict given, may record ſpecial matter, and thereon verdict ſhall be ſet aſide, and a new trial granted ib

A juryman, who hath a piece of evidence in his pocket, and after jury ſworn and gone together, ſhews it to them, is fineable; but verdict not avoided, tho caſe appears on examination ii. 306, 307

But

But if, after jury ſworn, either party deliver a piece of evidence to jury, and verdict is given for him, it ſhall avoid it; but then it muſt appear by examination, which muſt be indorſed on *poſtea* or verdict, ſo as it appear of record, and not barely by *affidavit* made after; but if verdict be given againſt him that delivered the evidence, it is good ii. *Page* 307

If a piece of evidence under ſeal be read in court, jury ought regularly to have it with them; but *contra*, if not under ſeal ib

If after jury ſworn, a piece of evidence not under ſeal be by court delivered to jury, it avoids not the verdict ib

So if delivered by a mere ſtranger, if verdict given againſt him, on whoſe behalf delivered ib

If after jury gone from bar, they ſend for a witneſs, who repeats his evidence to them, this appearing by examination, and being indorſed on *poſtea* avoids the verdict; but witneſs may be heard again in open court, and court or parties re-examine him ii. 296, 307

If depoſitions are read in open court to the jury, and as they are going from the bar, ſolicitor for the *king*, without conſent of parties, or order of court delivers copies of them to the jury, if they find againſt him, on whoſe part theſe were delivered, verdict is good; but if for him, and this appears by examination indorſed on *poſtea*, verdict ſhall be quaſhed, and a new *venire* or award for new jury returned ii. 308

After evidence given, where divers written evidences are read on both ſides, and clerk is making up his bundle of evidences under ſeal to deliver to jury, ſolicitor for plaintiff delivers a bundle of depoſitions to jury, ſome whereof were read, ſome not, and on examination this appeared, tho jury ſwore they opened not bundle delivered by ſolicitor, yet verdict for plaintiff for this cauſe avoided (matter being indorſed on the record), and a new *venire* awarded ii. *Page* 308

It might have been a miſdemeanor for jury to have looked into bundle delivered by ſolicitor ib

If party after jury ſworn ſpeak with a juryman of foreign buſineſs, this avoids not verdict after given for him ib

But if he, or any in his behalf ſay to a juryman after his departure from the bar, and before verdict given, *the caſe is clear for plaintiff*, this ſhall avoid verdict, if given for him, for it is new evidence ib

If *A.* be challenged off, and twelve more ſworn, yet *A.* goes with them, and is preſent at their conſultation, if *A.* gives no new evidence, nor intermeddles, verdict good, but *A.* ſhall be fined ii. 309

If one of the indictors be returned on petit jury, and do not challenge himſelf, he ſhall be fined ib

If a jury ſay *they are agreed*, and it being aſked, who ſhall ſay for them, they ſay *their foreman*, but on further inquiry they are not agreed, every one of them ſhall be fined apart ib

If a juryman be called and refuſe to appear, or if having appeared withdraw himſelf before ſworn, fineable ib

So if challenged, and while it is trying he withdraw, and challenge be over-ruled, and he be not preſent to be ſworn ib

If eleven were agreed, and the twelfth refuſed, formerly ſuch juryman hath been fined, and inqueſt taken by the other eleven ib

But both theſe courſes now diſallowed ib

If jury convict againſt reaſon and evidence, or without evidence,

and againſt direction of court, court may reprieve convict before judgment, and certify *king* for his pardon ii. *Page* 309, 310
Court may reſpite judgment on acquittal, if againſt full evidence ii. 310
In ſuch caſe *king* may have an attaint ib
By ſtatute juſticiar or ſteward, before whom any one is acquit of felony againſt pregnant evidence in *Wales*, or the *Marches* thereof, may bind over the jurors, &c. ib
Several inſtances of jurors finding againſt evidence, being fined, but not warranted by law ii. 160, 310 to 314
Where fined for their confederacy and practice ii. 311
Where in caſe of inqueſt of office jurors not finding according to evidence, have been fined ib
Whether *B. R.* can fine jurors for verdict againſt evidence ib
Jurors to be freemen, regularly freeholders ii. 264
Legales; without any juſt exception ib
De vicineto; but this not ſtrictly required, for they of one ſide of the county are by law *de vicineto* to try an offenſe of the other ſide of the county ib
By antient law, if jurors by miſtake or partiality give their verdict in court, yet they may rectify it before recorded, or go together again and reconſider it ii. 299, 300, 310
If recorded, they cannot retract, or alter it ii. 300
In felony or treaſon no privy verdict can be given ib
For *jury proceſs*. Vide **Trial.**
Vide **Challenge, Verdict.**

Juſtice of Aſſiſe and Niſi prius.

Juſtices of aſſiſe are to ſend their records determined into the Exchequer at *Michaelmas* ii. 31
By ſtatute *no man of law* ſhall be juſtice of aſſiſe, where born, or he doth inhabit, but it is uſually diſpenſed with by a *non obſtante* ii. *Page* 32
Whether, by 27 *E.* 1. *de finibus*, they may deliver gaol without any other commiſſion, and give judgment of felons ii. 39, 403
Safe to have a ſpecial commiſſion for that purpoſe ii. 39, 40, 403
In caſe of counterfeiting coin on 3 *H.* 5. they expreſly muſt have a ſpecial commiſſion ii. 40
If indictment in the country had been removed into *B. R.* and priſoner *there* had pleaded *not guilty*, after 27 *E.* 1. and before 6 *H.* 8. the tranſcript of record might have been tranſmitted to have been tried at *niſi prius*, and ſo in appeal ii. 39, 403
Naming them juſtices of *niſi prius* in 27 *E.* 1. is nothing, but the deſcription of their perſons, to whom commiſſions of *gaol-delivery* ſhall be directed ii. 40
Juſtices of *niſi prius* could not at common law give judgment in appeal or indictment ſent them out of *B. R.* by *niſi prius* to be tried, no more than in other ordinary civil cauſes, becauſe they have but tranſcript of record, and their commiſſion is only *ad triandum exitum* ii. 403
In appeals, juſtices of *niſi prius* may inquire of abettors, and give judgment, and if plaintiff nonſuit, arraign priſoner at *king*'s ſuit ii. 41
May allow clergy to a convict of manſlaughter on appeal ib
May by ſtatute proceed to trial and execution on indictment removed by *certiorari*, and ſent down to be tried by them ib
By 14 *H.* 6. have power in all felonies and treaſons to give judgment, and to award execution 350. ii. 403
This ſtatute gives them no power to inquire of abettors in appeal, nor

nor to arraign on a nonſuit before them at *king*'s ſuit *Page* 350. ii. 403

Juſtices of *niſi prius*, *nient obſtante* 14 *H.* 6. may, in caſe of indictment or appeal ſent them out of *B. R.* return *poſtea* into *B. R.* and there judgment may be given as at common law ii. 404

Juſtice of Peace.

They have no juriſdiction in treaſon, except as a felony [which treaſon includes], and as a breach of the peace; they may take examination of traitors, and impriſon them, and take information of witneſſes, and bind them over, and tranſmit theſe examinations and informations to next gaol-delivery, *&c.* 350, 372, 580. ii. 44

They cannot regularly arraign, try, and give judgment in treaſon, unleſs in ſuch caſes, as are by ſpecial *act* committed to their cognizance, becauſe their commiſſion extends not to it 350, 372. ii. 44

Per Rolls, C. J. they may take indictment of treaſon, tho they cannot try it 372

By ſome *acts* may take indictments of particular treaſons, but muſt certify them into *B. R.* or *gaol-delivery* ii. 44

May iſſue their warrants within precincts of their commiſſion for taking perſons charged of crimes within cognizance of ſeſſions, and bind them over to appear there, tho not indicted, notwithſtanding lord *Coke*'s opinion to the contrary 579

Where juſtice of foreign county may grant his warrant, and commit offender; and where offender taken in a foreign county muſt be carried before a juſtice of proper or foreign county, or which of them. Vide Arreſt.

If *A.* be in commiſſion of peace in proper county, and happen to be in a foreign county, and complaint is made to him of a felony done in proper county, as he cannot iſſue a warrant to take party, ſo neither can he impriſon in foreign county, becauſe an *act* of juriſdiction; but he may take oath of party robbed in purſuance of 27 *Eliz.* or may take examination or information, or recognizance in foreign county (*ſed quære* of the laſt), but cannot compel them by impriſonment *Page* 581. ii. 50, 51

One is a juſtice in two adjacent counties, tho by ſeveral commiſſions, whilſt he lives in one county, may ſend his warrant to arreſt in the other 580

Convenient, tho not always neceſſary, to take information on oath; if party ſuſpected, then to ſet down cauſe of ſuſpicion 582

When neceſſary or not to bind party to proſecute before warrant iſſued ib

Previous to commitment three things required. 1. Examination of party accuſed, but without oath. 2. Further examination of accuſers and witneſſes on oath. 3. Binding over proſecutor or witneſſes to next aſſiſes, *&c.* 585. ii. 111

Examinations ought to be in writing without oath, and returned or certified to next gaol-delivery, *&c.* and being ſworn by juſtice or clerk to be truly taken, may be given in evidence 585. ii. 52

If juſtice at return of warrant cannot take examination; he may *ore tenus* order officer to detain priſoner till next day, and this detainer juſtifiable without ſhewing particular cauſe, or any warrant *in ſcriptis* ib

Time of detainer muſt be reaſonable 586. ii. 46, 121

Information of proſecutor or witneſſes to be in writing on oath, and returned or certified at next

ſeſſions, &c. and being ſworn by juſtice or clerk, &c. to be truly taken, may be given in evidence againſt priſoner, if witneſſes dead, or unable to travel *Page* 305, 306, 586. ii. 52, 120
Whether juſtices of peace of a foreign county may tranſmit ſuch informations before juſtices, of *gaol-delivery* of proper county 305, 306
If juſtice commit or bail priſoner, he is to take ſurety of proſecutor to proſecute, and of witneſſes to appear and give evidence, and on refuſal may commit them to gaol 585, 586, ii. 121
Eſcapes within their juriſdiction 600
They *(nient obſtante* clauſe in their commiſſion) are not comprized under name of juſtices of *oyer* and *terminer* 686, 687. ii. 23, 44
Where neceſſary to enter their adjournments ii. 24
Where they may or not proceed ſame ſeſſions againſt party indicted before them ii. 28, 29, 48
They were by ſtatute to ſend their indictments not determined to juſtices of *gaol-delivery*, whether felonies or treſpaſſes, if party in gaol or bailed, but now unneceſſary ii. 32, 48
Where they may deliver priſoners by proclamation or not ii. 34, 46
Have power by ſtatute to reform *ore tenus* either pannel of grand or petit jury ii. 36, 155*, 156*, 265
They cannot make out proceſs, when indictment delivered over to juſtices of *gaol-delivery* ii. 37
Conſervators of the peace how antiently aſſigned ii. 42
Firſt eſtabliſhment of juſtices of peace by 1 *E.* 3. ii. 42, 99
Hearing and determining given them by 18 *E.* 3. ii. 42, 48, 109
Commiſſion of peace founded in theſe and other *acts* ii. 42
Conſiſted antiently of three, now only two *aſſignavimus* ib
Of the firſt and the powers it gives ii. *Page* 42
So of the ſecond ii. 42, 43, 44
Diſtribution of powers given them ii. 43
In returns or making up of records before juſtices of peace touching indictments or convictions, how they muſt be ſtiled ii. 43, 44
Juſtices of peace have power by ſtatute to hear and determine murders or manſlaughters, but ſeldom do, or any crime ouſt of clergy, and why ii. 45, 46
Juſtices of peace may take indictment of *ſe defendendo* ii. 45
May take inquiſition touching *felo de ſe*, if not inquired before coroners, it need not be *ſuper viſum corporis*, but is traverſable 414, 419. ii. 46
May by ſtatute proceed on indictment taken before former juſtices of peace in the county, but cannot proceed on indictment taken before commiſſioners of *oyer* and *terminer*, or *gaol-delivery* ii. 46
But by ſtatute indictment taken before ſheriff in his *Turn*, to be delivered to them at next ſeſſions, and they may proceed thereon ib
Commiſſion of *oyer* and *terminer* in the county determines ſecond *aſſignavimus* of commiſſion of peace *ad audiendum & terminandum, quod quære* ii. 47
General commiſſion of peace in county determinies not power of former juſtice by charter, nor of juſtice in a city or corporation parcel of county ib
Where no words of excluſion, juſtice of peace of county have a concurrent juriſdiction with thoſe by charter, and ſo if they be juſtices by commiſſion in town or city ib
King, notwithſtanding charter, may grant commiſſion of peace ſpecially in that city or county, and they will have concurrent juriſdiction with juſtices by charter ib

But if franchiſe be granted *ità quòd juſticiarii comitatûs ſe non intromittant*, tho ſubſequent commiſſion be granted in county at large, they have no juriſdiction in this corporation or town; but *quære*, whether indictment or ſeſſion in the franchiſe be void, or only contempt in juſtices ii. *Page* 47, 48
Seſſions private and public ii. 48
Buſineſs of private, *ale-houſes*, *poor*, *&c.* ib
Public ſubdivided into general quarter-ſeſſions and general ſeſſions ii. 49
Both to be ſummoned by precept in *king*'s name ib
In either of theſe ſeſſions they may proceed in matters within their commiſſion, as to take indictments, try felons, *&c.* ib
By particular *acts* ſome things limited to the quarter-ſeſſions ib
When quarter-ſeſſions to be held ii. 49, 50
Are variouſly held in ſeveral counties, and yet good ii. 50
In *Middleſex* regularly but two ſeſſions, yet they may hold quarter-ſeſſions ib
Juſtices to execute their authority as juſtices of peace within county, where juſtices ib
If juſtice live or be out of his county, he cannot by warrant fetch one out of it into county where he is ib
Whether a juſtice, who is ſuch, both in *London* and *Middleſex*, may not commit one in *Middleſex* brought out of *London* and *è converſo* ii. 51
Felony taken in foreign county, juſtice *there* may commit, examine, give oath to informers, and bind them over to give evidence, or commit them for neceſſity of preſerving the peace; but *quære*, whether ſuch examination and informations be evidence on arraignment of felon in proper county 305, 306, 586. ii. 51
Tho by cuſtom of *London* juſtices of *gaol-delivery* ſit at *Newgate*, which is in *London*, both for *Middleſex* and *London*, yet juſtices of peace for *Middleſex* ſit only in that county, and juſtices of peace for *London* there ii. *Page* 51
One is brought by *A.* before juſtice on ſuſpicion of felony, if *A.* can materially teſtify, juſtice may bind him over to proſecute, and if he refuſe, may commit him ii. 52
They have juriſdiction of felonies ariſing within the *verge* ib
In their ſeſſions may by common law proceed to outlawry on indictments found before them, and in popular actions by ſtatute ib
But cannot iſſue a *capias utlegatum*, but muſt return record of outlawry in *B. R.* and thence this proceſs ſhall iſſue ib
Where juſtices may proceed on indictments taken in *Turns* or *Leets* or not ii. 70, 71
Juſtice cannot diſcharge one brought before him for ſuſpicion of felony, if felony was committed, but muſt bail or commit ii. 93
One ſuſpected on probable cauſe preſumed ſuch till contrary appear ib
Some miſtakes of lord *Coke*, as that *a juſtice of peace cannot iſſue a warrant before indictment*, *&c.* refuted ii. 107 to 111
By 34 *E.* 3. their power further inlarged as to their taking perſons ſuſpected of felonies ii. 109
They are conſervators of the peace and more ib
Juſtice may by his warrant arreſt one ſuſpected of felony, tho original ſuſpicion not in himſelf, but in party praying the warrant ii. 109, 110
Fit in all caſes of warrants for arreſting for felony, much more for ſuſpicion thereof, to examine on oath party requiring it touching whole matter, whereon

on warrant demanded ii. *Page* 110, 111
Warrant to be under hand and ſeal 577. ii. 111
Regularly ought to contain cauſe ib
If general, *to anſwer ſuch matters as ſhall be objected*, in diſcretion of *B. R.* to bail or diſcharge party 578. ii. 111
It may excuſe an officer in falſe impriſonment, if true cauſe or miſdemeanor within connuſance of juſtice ib
Antiently ſuch warrants in treaſon or felony held good; in warrants of the peace and good behaviour cauſe muſt be ſhewn and why ii. 111
Juſtice may make his warrant to take one ſuſpected by name, but not all perſons ſuſpected; *contra* of a rule in *B. R.* for that purpoſe 580, 586, 587. ii. 105, 112
Juſtice may make a warrant, as well in caſe of felony as the peace, to bring party before himſelf only, or generally before any other juſtices, and then officer may bring him before any other juſtice of the county, and it is not in election of party to go before whom he pleaſes 582. ii. 112
In ſome caſes may make his warrant to bring him to the ſeſſions, tho it is better to bring him before himſelf, or ſome juſtice, that party may be bailed ii. 112
Warrant may be to bring party to the juſtice to find ſureties for his appearance at the ſeſſions, *&c.* and in mean time to keep the peace, or may be *ſi recuſaverit* to bring him to common gaol *ibidem moraturus quouſque gratis hoc fecerit*, and yet conſtable may bring him before the juſtice, and if he refuſe there to give ſureties, he may by virtue of firſt warrant bring him to gaol, and commit without any further warrant or *mittimus* ib
Warrant may be in *king*'s name with *teſte* of the juſtice, but more uſually in name of juſtice ii. *Page* 113
Whether juſtices out of ſeſſions can iſſue a warrant to take perſons offending againſt a penal law, tho within their cognizance, and ſo to bind them over to ſeſſions, or in default commit them, and this before indictment ib
On complaint and oath of goods ſtolen, and that party ſuſpects goods are in ſuch a houſe, and ſhews the cauſe of his ſuſpicion, juſtice may grant a warrant to ſearch in thoſe ſuſpected places mentioned therein, and to attach goods and party, in whoſe cuſtody they are found, and bring them before him, or ſome other juſtice to ſhew how he came by them, *&c.* this warrantable *nient obſtante* opinion of *Lord Coke* ii. 113, 150
But convenient to expreſs that ſearches be made in the day-time, and that party ſuſpecting be preſent to give officer information of his goods ii. 113, 114, 150
Entry to be *per oſtia aperta*; but if doors be ſhut, and be refuſed to be opened on demand, officer may break open doors ii. 114, 116, 117
Lawful clauſe in ſuch warrant to attach party, in whoſe cuſtody the goods are found ib
If the goods ſtolen be not in the houſe, officer is excuſed that breaks open the door to ſearch for them on juſtices warrant; but party that made ſuggeſtion puniſhable, for *in eventu* it is puniſhable in him ii. 151
On return of this warrant executed, if it appear they were not ſtolen, they are to be returned to the poſſeſſor; but if it appear they were, they are not to be delivered to the proprietor, but to remain with ſheriff

riff or conſtable, that party may proceed by convicting offender to have reſtitution ii. *Page* 151
If goods not ſtolen, party to be charged ib
If ſtolen, but not by him, but another that ſold or delivered them to him, and priſoner appear to be ignorant that they were ſtolen, he may be diſcharged as an offender, and bound over to give evidence as a witneſs againſt him that ſold them ii. 151, 152
If he knew they were ſtolen, fit to bind him over to anſwer the felony ii. 152
Theſe warrants are judicial *acts*, and muſt be granted on examination of the fact ii. 150
To whom to be directed, and what the purport thereof ib
General warrant to ſearch all places, whereof party and officer have ſuſpicion, tho uſual, not ſafe ii. 114, 150
Warrant ought to mention name of party to be attached, and muſt not be left with blanks to be filled up by party, ſuch warrant void 577. ii. 114
If there be a riot or breach of the peace in preſence of a juſtice, he may arreſt the rioters, or command any officer, or others *ore tenus*, without warrant to arreſt them, and they by virtue thereof may arreſt *flagrante crimine* in abſence of the juſtice ib
If a riot be committed, and rioters diſperſed by coming of the juſtice, and they be ſuſpected probably to meet again, or threaten it, tho conſtables may *ex officio* ſuppreſs the riot, and raiſe *poſſe* of vill to do it; yet a juſtice may deliver a ſpecial warrant to arreſt the rioters, if they re-aſſemble, tho there be no particular perſons named in warrant; he may even authorize them by word ii. 114, 115
Juſtice muſt either diſcharge or commit, or bail one arreſted for felony brought to him ii. *Page* 120
If one be brought before a juſtice expreſly charged with felony by oath, juſtice cannot diſcharge him, but muſt bail or commit ii. 121
If charged with ſuſpicion only, yet if no felony proved to be committed, or if fact be no felony, juſtice may diſcharge him as to felony; tho if a treſpaſs, he may bind him over for it ib
If one be killed by another, tho *per infortunium*, or *ſe defendendo*, (which is not properly felony), or in aſſault on an officer, (which is no felony at all) juſtice ought not to diſcharge him, therefore he muſt be committed, or at leaſt bailed ib
They cannot proceed on an indictment taken before ſuperior judges tho otherwiſe the cauſe might be within their cognizance ii. 133
They, as to their *venire facias*, agree with juſtices of *oyer* and *terminer*, and may indict, arraign and try ſame day in caſes of felony ii. 261, 262
By ſtatute proceedings before them not diſcontinued by new commiſſion ii. 401, 405

Vide **Arreſt, Bail, Commitment,** &c.

Juſtification.

Where warden of the *Fleet* may juſtify impriſonment by virtue of an order of *Chancery* ii. 122
In treaſon or felony there can be no juſtification, as *ſe defendendo*, &c. ii. 258
But on *not guilty* priſoner ſhall have advantage of all ſuch defenſes, and where matter appears not to be felony, he on *not guilty* pleaded, may be acquitted

acquitted ii. *Page* 258, 259, 303, 304
Where, and how arreſt on ſuſpicion may be juſtified, or not. Vide Arreſt.
Where one may juſtify breaking open doors, or not. Vide Arreſt, Hue and Cry, Juſtice of Peace.
Where one may juſtify beating a treſpaſſer, come to take his goods, or endeavouring to enter on his poſſeſſion, or not. Vide Homicide.

King.

PRESUMED that he neither will, nor can do any wrong, and therefore, if he command an unlawful *act* to be done, the inſtrument is not thereby indemnified, but puniſhable 43, 44
Tho he is not under the *coercive*, yet in many caſes his commands are under the *directive* power of the law, which makes the *act* itſelf invalid, if unlawful 44, 127
In time of peace, if two men combat together at barriers, &c. and one kill the other, it is homicide; but if by the *king*'s command, it is ſaid to be no felony 44
By deſcent of crown *king* inveſted with the right of ſovereignty 61, 101
Supremacy of the *king* in matters eccleſiaſtical a moſt unqueſtionable right 75
Weight, allay and extrinſic value of coin *inter jura majeſtatis* 191 192, 204
Clauſe in 28 *H.* 8. enabling him to diſpoſe of lands by will was neceſſary, for otherwiſe he could not have done it by will 278
But without this *act* he had power to diſpoſe of lands belonging to the crown or *ducky* by letters patents under theſe reſpective ſeals 278
Where there are three powers, as of juſtices of *oyer* and *terminer*, *gaol-delivery*, and the peace, and record is made up by all theſe powers, the beſt ſhall be taken for the *king* ii. *Page* 34
Office of coroners being by election is not determined by *king*'s demiſe ii. 55
King cannot arreſt in perſon, or impriſon or command another ſo to do, but by writ, &c. ii. 131
King's title being of record muſt be avoided by record ii. 205
If *king* ſit in perſon in *B. R.* he cannot pronounce judgment in treaſon, for, as he cannot be a witneſs, ſo he cannot be a judge *in propriâ cauſâ* ib
Where *king*'s teſtimony allowed, or not, and how *king* to exhibit his teſtimony ii. 282
Who king, queen, prince, &c. within 25 *E.* 3. *de proditionibus* Vide Treaſon.
Vide Alligeance, Forfeiture, Grant, &c.

King's Bench.

Marſhal immediate officer to execute judgment of death 464, 502. ii. 5
And for that purpoſe is mentioned in judgments of treaſon ii. 411
There may be a mandate to the ſheriff to aſſiſt ii. 5
Chief Juſtice or any other judge of *B. R.* may iſſue a warrant into any county, for taking or bringing before him a felon, or one ſuſpected of felony into any county in *England* or *Wales* 578. ii. 5, 6, 198
They are conſervators of the peace through all *England*, more than juſtices of *oyer* and *terminer* 578. ii. 5
To avoid trouble of bringing up offenders, before whom their warrants are made returnable, and to whom directed 578. ii. 6
How their warrants ought to run in caſes of ſurety of the peace, &c.

&c. againſt one in another county, than where they are *Page* 578. ii. 5, 6
Tipſtaves the marſhal's deputies; each judge hath one 586. ii. 6
A judge of *B. R.* may order an arreſt *ore tenus*, without expreſſing cauſe ib
Where *B. R.* hath made an order to take perſons that party grieved ſuſpects, and bring them into court 586, 587
B. R. ſwears a grand inqueſt, and take indictments every term 651. ii. 3
Higheſt ordinary court of juſtice next to parliament ii. 2, 159
It is more than a court in *Eyre*; where it ſits, it is ſovereign court of *gaol-delivery*, and *oyer* and *terminer*; the judges are *juſticiarii ordinarii* ii. 4, 22
It is the center of all ſubordinate juriſdictions, eſpecially in matters capital ii. 401
It hath two kinds of juriſdiction, the plea and crown-ſide ii. 2
Ancient and modern way of keeping and titling the records ii. 23
Grand inqueſt to preſent all matters criminal within *com. Middleſex*, and then *B. R.* proceeds on indictment ſo taken ii. 3
Where *B. R.* proceed on offenſe committed in ſame county, they may proceed *de die in diem*, fifteen days betwixt *teſte* and return of *venire fac.* not required; otherwiſe if they proceed on a cauſe removed by *certiorari*, except on indictment taken by juſtices of peace of county, where *B. R.* ſits ii. 3, 260
At common law record before filing remandable, afterwards not ii. 3
But if iſſue joined tranſcript may be ſent down to be tried at *niſi prius*; but original record remains in *B. R.* ib
By 6 *H.* 8. court may remand indictments of felony removed hither, and bodies of priſoners to the juſtices of peace, *&c.* where felony committed ii. *Page* 3, 4, 41
Coming of *B. R.* into any county ſuſpends (not ſuperſedes) ſeſſion of commiſſion of *gaol-delivery*, *oyer* and *terminer*, and the peace ii. 4
Where ſpecial commiſſioners of *oyer* and *terminer* may ſit in term in ſame county, where *B. R.* ſits, but *B. R.* muſt adjourn ib
Tho ſome *acts* limit proceedings in criminal cauſes to commiſſioners of *oyer* and *terminer*, *B. R.* may proceed upon them; but juſtices of peace cannot ib
One attaint, and record removed, it may award execution ib
It is ſovereign coroner of *England*, and may take appeals of death, *&c.* by bill ii. 5
Chief Juſtice chief coroner *virtute officii* ii. 53
Felonies within *king*'s palace, *nient obſtante*, 33 *H.* 8. triable in *B. R. contra* where felony created *de novo* with ſpecial form of proceedings ib
By cuſtom may *ore tenus* command a tipſtaff to apprehend for miſdemeanors ii. 6
Chief Juſtice not the *Juſticiarius Angliæ* ib
The immenſe authority of the antient *Juſticiarius Angliæ* 106. ii. 6
Chief Juſtice created by writ ii. 6
B. R. had antiently, in caſes of felonies and treaſons done on the narrow ſeas, out of bodies counties, a concurrent juriſdiction with the admiralty ii. 12, 13
B. R. compriſed in *acts* giving power to juſtices of *oyer* and *terminer* ii. 22
On trial of felons in *B. R.* if priſoner challenge twenty peremptorily, ſo that thoſe remaining of the pannel be not ſufficient; *tales* to be granted by precept returnable, as the caſe ſhall require ii. 26

Clerks

Clerks of the crown, aſſiſe and peace to certify hither names of all perſons *outlawed, attaint* and *convict* ii. *Page* 36, 37
One ſlain in open rebellion, Chief Juſtice on view of body may make a record thereof, and ſend it into *B. R.* and thereon party ſhall forfeit his goods, but not lands ii. 53
Clerk of crown, coroner for *B. R.* to view body of priſoner dying in king's bench ii. 58
Have not only power to iſſue writs on indictments and appeals before them; but alſo may by order command ſheriff of county, where they ſit, or their marſhal to take felons or diſturbers of peace, and bring them before the court ii. 105
Cuſtom of the court part of the law of land ib
Where on information on oath of breach of the peace, and a deſign by perſons, whoſe names could not be known, to commit a riot, *B. R.* hath made an order to the ſheriff to bring before them ſuch as ſhould be probably ſuſpected to be parties therein 586, 587. ii. 105
Where B. R. *may give judgment on record of conviction removed before them*, &c. Vide Judgment.
Vide Certiorari Court, Execution and Reprieve, Gaol-delivery, Habeas Corpus, Juſtice of Aſſiſe, Juſtice of Peace, Outlawry, Oyer and Terminer, Proceſs, &c.

Larciny.

DIVIDED into ſimple and violent, ſimple larciny ſub-divided into grand and petit 503
Grand and petit larciny deſcribed 530
Same in nature, but different in degree of puniſhment ib
Definition of larciny 504
How the indictment muſt be *Page* 504
What are the ingredients in this crime ib
What ſhall be ſaid a taking 505, 506
A. lends his horſe to *B.* who rides away with him no felony 505
If a man ſeeing a horſe in paſture of owner, having a mind to ſteal him, obtains a replevin, and thereby hath the horſe delivered, this a felonious taking 507
A. ſteals horſe of *B.* and afterwards delivers it to *C.* who is no party to firſt ſtealing, and *C.* rides away with it *animo furandi*, larciny ib
But if *A.* feloniouſly take the horſe of *B.* and after *C.* ſteal him from *A. C.* is a felon to both, and *C.* may be appealed or indicted as of a felonious taking from *B.* for by the theft *B.* loſt not property, nor in law poſſeſſion of his horſe ib
Where a carrier ſhall be ſaid to be guilty of a felonious taking of goods delivered to him or not 504, 505
Carrying the goods to the place of delivery, and taking them afterwards, a new taking 505
Before 21 *H.* 8. if a ſervant had carried away goods delivered to him by his maſter *animo furandi*, it had not been felony 667
By this act made felony, if of value of forty ſhillings; offender intitled to clergy, [but where ouſted by 12 *Annæ*] ib
An Apprentice or ſervant under eighteen exempt from felony enacted *de novo* by 21 *H.* 8. [how far altered by 12 *Annæ*]. ib
Yet it leaves him in ſame condition, as to any felony at common law, as if he was not excepted 668
And therefore, if my butler or ſhepherd under eighteen, or if my apprentice take away my goods feloniouſly, without my actual delivery, tho under value

lue of 40*s.* he is indictable of felony at common law *Page* 506, 667, 668
If a man deliver a bond to his ſervant, or goods to ſell, and he ſells them and receives the money, and carries it away *animo furandi*, not felony 668
Whether delivery of maſter's goods by one ſervant to another, in maſter's abſence, may be ſaid to be by the maſter; delivery of the goods by maſter's wife within the *act* ib
A ſervant receives his maſter's rents, and *animo furandi* carries them away, not felony ib
A. delivers the key of his chamber to *B.* who unlocks the chamber, and takes *A.*'s goods *animo furandi*, felony ib
One that hath a bare charge of goods, tho not poſſeſſion, may be guilty of felony at common-law; as a butler that hath charge of plate, a ſhepherd of ſheep, the like of him that hath *a bare ſpecial uſe*, as the gueſt, that hath plate ſet before him 506, 667, 668
If *A.* by falſe tokens receives money of *B.* and carries it away, no felony 505
Maſter delivers ſilver to ſervant to change into gold, or leather to make ſhoes, and he runs away with it felony 668
Finding a purſe in the highway, and denying or ſecreting it, not felony 506
Taking treaſure-trove, wrecks, waifs and ſtrays [before ſeiſure] no felony, but party muſt believe them to be ſuch ib
Where a man's goods are in ſuch a place, where ordinarily they are, or may lawfully be placed, and a perſon takes them *animo furandi*, felony ib
If a ſheep of *A.* ſtray from his flock into the flock of *B.* and *B.* drives it along with his flock, or by miſtake ſhears it, no felony; but otherwiſe, if he knows it to be another's, and marks it with his mark, this evidence of felony *Page* 507
A ſervant finds his maſter's purſe in his corn-mow, and takes part, if he knew his maſter laid it there, felony ib
If *A.* ſteals goods in the county of *B.* and carries them into county of *C.* he may be indicted for larciny in county of *C.* but can only be indicted of robbery in county of *B.* 507, 508
Where continuance of the aſportation is a new caption 507
A. takes the horſe of *B.* and before he gets out of the cloſe is apprehended, larciny 508
If a gueſt takes ſheets off the bed feloniouſly, and carry them out of his chamber into the hall, felony ib
A. came into the dwelling-houſe of *B.* where nobody was, and broke open a cheſt, and took out goods to the value of 5*s.* and laid them on the floor, and was taken before he could remove them, he being indicted on 39 *Eliz.* was ouſted of clergy ib
If *A.* hath his keys tied to the ſtrings of his purſe, *B.* a cut-purſe, takes *A.*'s purſe with money in it out of his pocket, but the keys, which were tied to the ſtrings of his purſe, hang in his pocket, *A.* takes *B.* with his purſe in his hand, but the ſtrings hang to his pocket by the keys, no felony; for *licèt cepit, non aſportavit* ib
Where there is a pretenſe of title, regularly no felony; but yet it may be a trick to colour a felony 509
What circumſtances are evidence of a felonious intent 508, 509
If *A.* takes away goods of *B.* openly (otherwiſe than by robbery) this evidence only of a treſpaſs ib
A. leaves his harrow in the field, *B.* having land in the ſame uſeth

seth the harrow, and returns it to the place where it was, no felony, but treſpaſs *Page* 509

If *A.* and *B.* being neighbours, and *A.* having a horſe on the common, and *B.* having cattle there that he cannot readily find, takes up the horſe of *A.* and rides about to find his cattle, and having done turns off the horſe again in the common, no felony, but at moſt a treſpaſs ib

So if my ſervant without my privity take my horſe, and ride a few miles and return, no felony; but *contra*, if in his journey he ſell it ib

Of what things larciny may be committed or not 509, 510

Of *creatures of a baſe nature*, as *dogs*, *bears*, &c. or their *whelps* there can be no felony; but of *hawks* reclaimed it may be 512

Larciny may be committed of *young hawks* in the neſt, but not of their eggs; *taker of eggs*, how puniſhed 511

Larciny cannot be committed of wild ſwans, or their young; but *contra*, if they be made tame, or if they be marked, or pinioned; but if marked and yet flying ſwans that range abroad out of precincts of the owner, no felony to kill them ib

On indictment for ſtealing goods of *B.* who is proved to be a *feme covert*, party may be acquitted, ſo if it appear that the ſuppoſed owner had neither intereſt nor poſſeſſion in the goods, but he ought to be indicted *de novo* for goods of huſband or true owner 513

Where a man may commit felony of the goods, wherein he hath a property ib

Jointenants or tenants in common of a horſe, one cannot be a felon to the other ib

A. takes away the trees of *B.* and cuts them into boards, *B.* may take them away, and not felony; and ſo of cloth made into a doublet ib

If *A.* take away the hay and corn of *B.* and mingle it with his own ſtock, or take the cloth of *B.* and embroider it, *B.* may take the whole heap or garment, and embroidery alſo, and be not guilty even of treſpaſs *Page* 513

Yet if *A.* bail goods to *B.* and ſteal them from him to charge him with an action, felony ib

Wife cannot commit felony of her huſband's goods, and therefore, if ſhe take and deliver them to *B.* who knowingly carries them away, no felony in *B.* 513, 514

If huſband deliver goods to *B.* and wife take them felonioufly from *B.* felony 514

Taking away another man's wife againſt her will *cum bonis viri*, felony by ſtatute ib

Servants in the houſe imbezzeling their maſter's goods after his deceaſe by 33 *H.* 6. if they appear not on proclamation, attaint of felony 515

To ſteal *ſhroud of a perſon buried*, felony ib

Larciny from the perſon clàm & ſecretè by 8 *Eliz.* except under value of 12*d.* principals ouſted of clergy, acceſſaries not 531

Horſe-ſtealers ouſted of clergy by 1 *E.* 6. & 2 & 3 *E.* 6. but acceſſaries not 529

Petit larciny, felony 530

No acceſſaries either *before* or *after* ib

If *A.* ſteal 12*d.* at one time, and *B.* 12*d.* at another, ſo that the *acts* were ſeveral, tho the goods of the ſame perſon; petit larciny in each ib

If *A.* be indicted of larciny of goods to the value of 5*s.* petit jury may find it of value of 12*d.* or under ib

If *A.* ſteal from *B.* to value of 6*d.* and then to value of 8*d.* it is grand larciny, if put together in one indictment 531

If goods be ſtolen at ſeveral times from ſeveral perſons, and each apart under value, ſeveral petit larcinies,

larcinies, tho in one indictment *Page* 531
But *contra*, if ſuch goods of ſeveral perſons were in one bundle, or on one table, or in one ſhop, grand larciny ib
If a man ſteal a horſe not above value of 12*d.* or break a houſe in the day time, and ſteal goods only of that value, the owner *&c.* not put in fear, this but petit larciny, notwithſtanding 5 & 6 *E.* 6. for that ſtatute only ouſts clergy, where offenſe capital, as grand larciny ib
Taking from perſon without putting in fear or violence is not robbery, but larciny 534
Where words of menace are uſed after the taking, only larciny ib
For larciny from the houſe or ſpecial burglaries. Vide **Burglary.**
Vide **Clergy, County, Felony by Statute, Indictment,** &c.

Laws.

Laws of England.

More determinate, than foreign laws, and leave as little as may be *ad arbitrium judicis* 13
This law allows not the judge to change the puniſhments it inflicts 19
Always affects certainty 22
Hath no dependance on the civil law 16
Is excellently adapted to the conveniences of *Engliſh* government, and full of excellent reaſons 489
Common law in and after *E.* 3. received a greater perfection, not by change thereof, for that could not be but by ſtatute; but men grew to greater learning and experience, and rectified miſtakes of former ages and judgments 24, 25
The *king* and his laws are *vindices injuriarum* 481

Natural Law.

If one be violently aſſaulted, and cannot otherwiſe ſave his own life, law of nature permits him in his own defence to kill aſſailant *Page* 51
Nature prompts all men in whatſoever condition to preſerve themſelves, which cannot be without ſociety 432
Law of nature makes a man his own protector *cum debito moderamine inculpatæ tutelæ* 51

Poſitive Law.

Penalties, as to their degrees and applications, are *juris poſitivi & non naturalis* 13
Lex talionis, except in murder, is purely *juris poſitivi*, and the *Jews* made a commutation of it 14

The antient divine Law, the Moſaic, Attic, and Roman Laws touching Homicide

By the antienteſt divine law homicide was capital 2
Delivery of a man into his neighbour's hand, explained ib
Who were intitled, or not, by the *Moſaic law* to the privileges *of places and cities of refuge* ib
Killing a thief found breaking up in the night, not capital; but *contra* in the day 488
The judicial laws made no difference in puniſhment of *homicide* on *malice forethought*, and on a *ſudden falling out*, both capital; but they extended not that rigour to *caſual homicide*, but yet were ſo ſtrict, as to ſuffer *avenger of blood* to kill ſuch manſlayer before he got to *city of refuge* 477
There is not amongſt theſe laws any one which is expreſs touching *homicide ſe defendendo*, but

cuſtom of the *Jews*, and interpretation of their doctors exempted a fact ſo circumſtanced from capital puniſhment *Page* 4
If a woman quick with child took, or another gave her a potion to cauſe *abortion*, or one ſtruck her, whereby *fœtus* was killed, by the *judicial laws* it was capital 433
Many of the *Attic* laws touching *homicide* collected by *Petit* cited; between which and the *judicial laws* there is a great analogy 4 to 7
Wherein the *Roman* laws differ from, and agree with them 6, 7, 488

The Attic, Jewiſh, Roman and antient Engliſh Laws touching Theft.

By *Jewiſh* law theft not capital, tho accompanied with burglary, ſave that *plagium* was capital, and that by the civil conſtitution of that ſtate, puniſhment of theft was in ſome caſes enhanſed even to death 9
Of the law of reſtitution in caſe of *theft* 9, 503
Wherein the *Attic* and *Jewiſh* laws agree and differ with regard to theft 9
The *Roman laws* concerning puniſhment of *theft* 11, 503
The *antient laws of England* touching the ſame 11, 12, 503
Notwithſtanding opinion of *ſchoolmen*, &c. policy of moſt countries hath made it capital 12, 13
Among the *Jews* lawful in caſe of hunger to pull the ears of ſtanding corn and eat, and for one, that paſſed thro a vineyard, &c. to gather and eat, without carrying away 55

Puniſhments inflicted by the Laws of ſeveral Countries.

What the rule to be obſerved in ordaining puniſhments 1
How divided *Page* 1
The penalties inſtituted by God, amongſt the *Jews*, on breach of their laws, are the beſt pattern for inſtitution of puniſhments, tho they conclude not other ſtates 2
Inſtances of various kinds of puniſhments inflicted by laws of ſeveral countries, eſpecially in *homicide* and *theft* 2 to 15
The degrees and orders of the *Roman* puniſhments 11
The end and deſign of puniſhments 14
By *Jewiſh* law thief had no exemption from puniſhment by reaſon of *neceſſity* 55

Law of Nations.

Allows a ſovereign prince to begin hoſtilities with another deſigning a war againſt him; but *contra* between ſubjects of ſame prince, there one cannot kill another by way of prevention 52
Where the *king* may deal with a *merchant ſtranger*, who commits treaſon, either as an *alien enemy by the law of nations*, or as a traitor by the law of *England* 94
Vide Alligeance, Ambaſſador, Marque or Repriſal, War.

Civil Law.

Civil laws wiſe and well compoſed laws, of great uſe to be known, tho not to be made the rules of our *Engliſh* laws; no ſtreſs to be laid on them, either for diſcovery, or expoſition of *Engliſh* laws, farther than by cuſtoms of *England* or ſtatutes they are here admitted 16
Where *civil law* lays a penalty on tutor for offenſe done by infant *incapax doli* 19
Inſtances of *artificial acceſſions* by *adjunction*, *commixtion* and *ſpecification*

cification in the common law [the ſame as are in the *civil law*] *Page* 513
Where party according to *civil law* may be examined, as a ſupplemental proof ii. 285
How the civil law *diſtinguiſheth the age of man for ſeveral purpoſes, and wherein the civil and common law agree and differ.* Vide Infant.
By the antient *Jewiſh* law he, that was but a day above thirteen years, was adjudged *in virili ſtatu*, but not if under that age 18

Canon Law.

Canons or *decretals of popes, or of provincial councils, or imperial conſtitutions* never bound in *England*, farther than by ſtatutes or common uſage they were received 399. ii. 325, 329, 330
By canon laws nuns exempt from temporal juriſdiction ii. 328
Vide Clergy, Religion.

Rhodian Law.

If common proviſion for ſhip's company fail, maſter may under certain temperaments break open private cheſts of mariners or paſſengers, and diſtribute private proviſion for preſervation of ſhip's company 55
It is a received cuſtom, if a ſhip wants neceſſaries, and inhabitants of continent will not furniſh them for money, they may by *uſage of the ſea* and *nations* take proviſions by force, making inhabitants reaſonable ſatisfaction ib
But *contra*, where this done by *Engliſh* mariners on *Engliſh* ſhore, where there is one common magiſtrate, becauſe capable of other remedy 56
For *maritime* and *martial laws*. Vide Admiralty, Conſtable and Marſhal.

Leet.

Eſcape preſentable there, but common fine or amercement cannot be ſet there, but it may be removed in *B. R.* and there amercement may be ſet *Page* 603
Felony newly created not inquirable there, unleſs ſpecially limited to them, but *contra* of felonies at common law 632. ii. 71
Cannot hold pleas of the crown ii. 69, 71
Hath in effect ſame juriſdiction with the *Turn* ii. 71
They cannot try felonies preſented there, but muſt ſend ſuch preſentments before juſtices of *gaol-delivery*, or they muſt be removed into *B. R.* that proceſs may be made on them to outlawry ib
Vide Sheriff.

Local. Vide County, Indictment, Trial.

London.

By charter *mayor* to be in commiſſion of *oyer* and *terminer*, but not on indictment grounded on 8 *H.* 6. againſt *avoiding records* 562
He is alſo of the *quorum* in commiſſions of *gaol-delivery* by charter ii. 32
Whether juſtice both in *London* and *Middleſex* may not commit one in *Middleſex* brought out of *London*, and *è converſo* ii. 51
Cuſtom of *London* enables juſtices of *gaol-delivery* to ſit at *Newgate*, which is in *London*, both for *Middleſex* and *London*; but juſtices of peace of the ſaid counties ſit in their reſpective counties only ib
Mayor by charter coroner ii. 53

Lunatic. Vide Idiot, &c.

Madman. Vide Idiot, &c.

Mainoubre. Vide Arraignment.

Mainprize. Vide Bail.

Malum prohibitum.

BEING only under a penalty will not inhanſe effect of crime beyond its nature, as if one unqualified to keep a gun ſhoots at a bird, and caſually kills a man, it is only chance-medley *Page* 475, 476

Manslaughter. Vide Murder and Manslaughter.

Mariner.

Whether lawful to impreſs them 678, 679

Vide Admiralty, Felony by Statute, Rhodian Law under title Laws.

Market-overt. Vide Reſtitution.

Marque, or Repriſal.

A ſpecies of war 162

Particular, granted to ſome particular men on certain occaſions to right themſelves. (*Vide* 4 *H.* 5.) ib

General, tho it hath the effect of war, is not a regular war, and wherein it differs ib

Martial Law. Vide Conſtable and Marſhal.

Marriage.

A forcible marriage, tho voidable, is a marriage *de facto* 660, 661

Vide Forcible Marriage, Polygamy.

Maſter and Servant.

Command of maſter excuſeth not ſervant in treaſon or felony *Page* 44, 516

Poſſeſſion of ſervant is poſſeſſion of maſter 668

Menial ſervant, how deſcribed by *Bracton* ii. 75

For homicide in ſervant *defendendo the maſter*, and *è converſo*.

Vide Homicide.

Maxims.

Malitia ſupplet ætatem 26

Ignorantia eorum, quæ quis ſcire tenetur, non excuſat 42

Expreſſum facit ceſſare tacitum 235, 614

Quòd dubitas, ne feceris, eſpecially in caſes of life 300, 509

Stabit præſumptio, donec probetur in contrarium 516

A man ſhall not take advantage of his own wrong to gain the favourable interpretation of law 482

Nor can he apportion his own wrong and breach of duty 597

De minimis non curat lex 603. ii. 154

Fictio juris intenta ad unum 630

Nullum tempus occurrit regi 632

[*Unicuique licet*] *renunciare juri pro ſe introducto* ii. 224

Tutius ſemper eſt errare in acquietando, quàm in puniendo, ex parte miſericordiæ, quàm ex parte juſtitiæ ii. 290

Tutius erratur ex parte mitiori ii. 305

Fruſtra legis auxilium quærit, qui in legem committit ii. 386

Militia.

By what *acts* declared to be the right of the crown 130

Miſnomer. Vide Abatement.

Miſprision.

Whether a wife can be guilty of miſpriſion of treaſon committed by huſband; *quære* *Page* 48
Two witneſſes requiſite both on indictment and trial of miſpriſion of treaſon 300
A phyſician, *&c.* miniſters help to a ſick traitor, tho he know him to be ſuch, this makes phyſician, *&c.* not incur the guilt of treaſon; but it will be miſpriſion of treaſon, if he know it, and diſcover it not 332
Miſpriſion of treaſon at common law defined 371
By ſtatutes concealment of treaſon ſhall be deemed only miſpriſion of treaſon ib
By 1 *Mar.* enacted, that nothing be adjudged to be miſpriſion of treaſon, but what is contained in 25 *E.* 3. and tho that *act* do not make or declare miſpriſion of treaſon, yet it virtually doth it by declaring and enacting what is treaſon 371, 372, 375
Uttering falſe money knowingly not miſpriſion of treaſon, without knowing the counterfeiter, and concealing it 372, 373
Act puiſne to 1 *Mar.* makes a new treaſon, concealment of ſuch treaſon, miſpriſion thereof 373 375
Concealment of treaſon or felony by common law or ſtatute is a miſpriſion of the reſpective offenſe 374, 618, 708
Every treaſon is a miſpriſion thereof, and more, and he, who is aſſiſting to treaſon, may be indicted of miſpriſion only 374
Every felony includes miſpriſion thereof, and offender may be indicted of the latter only 652 708
Miſpriſion remains ſo long, as the *act* making treaſon continues, and ſo of miſpriſion of felony enacted by ſtatute 375
Beſide conſequential, there are ſubſtantive miſpriſions, as by 14 Eliz. *againſt forging foreign coin not current*, 13 Eliz. *againſt concealing the publiſhing by others of bulls of abſolution*, *and* 23 Eliz. *againſt aiders and maintainers of perſons abſolving or withdrawing the ſubjects from their obedience, or perſuading them from the eſtabliſhed religion*, &c. *Page* 376, 377
Where felony by ſtatute limited to a ſpecial juriſdiction, and manner of trial, miſpriſion of it triable by common jury and general commiſſioners of *oyer* and *terminer* 653
Where upon commiſſion of felony looking on without uſing means to take the felon is a miſpriſion of felony 439, 448, 449. 593. ii. 75, 76

Mittimus.

Vide Arreſt, Commitment, Juſtice of Peace.

For mittimus and tranſcript of record. Vide Certiorari, Pleas.

Murder and Manſlaughter.

If one *ex intentione* do an unlawful *act* tending to bodily hurt of another, as by ſtriking him, tho not with intent to kill him, but his death happens within year and day, or if he ſtrikes at one, and miſſing him kills another, whom he did not intend, it is felony and homicide, and not *caſualty*, or *per infortunium*; ſo it is, if he do an unlawful act, tho not intending bodily harm of any man, as if he throw a ſtone at another's horſe, and it hits a man and kills him 39, 440 472
Want of due diligence and inſpection may make that manſlaughter, which otherwiſe would be only chance-medley 475, 476
Homicide juſtifiable by ſtatute *de malefactoribus in parcis* not to

be committed on any former malice, what required to juſtify ſuch homicide *Page* 491
In time of peace, if two combat together at barriers, or for trial of ſkill, if one kill the other, it is homicide; but *contra* if by *king*'s command 44, 473
33 *H.* 8. as to trial in a foreign county of murder, now in force, tho not as to *treaſon* 283, 374
Murder and homicide defined 425, 449, 450, 466
Murdrum, what it antiently imported 447, 448
Stroke without death, nor death without ſtroke, or other violence, makes not the homicide 426
To what intents murder or manſlaughter relates to the ſtroke, or other cauſe of death, and to what purpoſes it relates to the death only 426, 427, 428
If a mortal ſtroke [before 2 *G.* 2.] had been given on the *high ſea*, and party had come to *England* and died, neither admiral nor common law had juriſdiction 426
By 2 & 3 *E.* 6. the juſtices or coroner of the county where party dies, ſhall inquire and proceed, as if ſtroke had been in ſame county 427
By ſame *act* indictment and trial of acceſſaries ſhall be in county, where acceſſary ib
No murder till party dies ib
If one gives another a ſtroke, not ſo mortal, but that with good care he might be cured, if he dies of the wound within year and day, homicide or murder according to the caſe 428
But if it be not mortal, but with ill application party dies, if it appear clearly, that the medicine and not wound was cauſe of his death not homicide ib
If not in itſelf mortal, if either for want of applications or neglect thereof, it turns to a *gangrene*, or fever, which proves immediate cauſe of his death, murder, or manſlaughter; wound *cauſa cauſati* ib
One gives a wound to another ſick of a diſeaſe, which by courſe of nature might end his life within half a year, it haſtens his end by irritating the diſeaſe, murder or manſlaughter *Page* 428
If a man by working on the fancy of another, or by harſh uſage put another into ſuch a paſſion of grief or fear, that party dies ſuddenly, or contracts a mortal diſeaſe, tho murder *before God*, yet not ſo *in foro humano* 429
Phyſician or ſurgeon gives a potion with a good intent, it kills patient, no homicide; neither if he be no licenſed ſurgeon or phyſician 429, 430
One gives a pregnant woman a potion to deſtroy the child, it kills her, murder 429
Owner of a beaſt uſed to hurt people not knowing it, diſpuniſhable 430
Knowing it, and not keeping him up from doing hurt, how puniſhable 430, 431
Tho owner have no notice, if it be a beaſt *feræ naturæ*, as a lion, *&c.* if he gets looſe and doth harm, owner liable to damages, for he muſt at his peril keep him up from doing hurt 430
If owner, knowing that his ox is uſed to hurt people, uſe due diligence to keep him up, yet ox breaks looſe, and kills a man, no felony 431
If through negligence beaſt goes abroad after warning of his condition, manſlaughter ib
If owner purpoſely let him looſe to do miſchief, or with a deſign only to fright people and make ſport, and it kills a man, murder ib
Laying poiſon to kill rats, a man caſually is poiſoned, no felony ib
But if to kill *B.* and *C.* by miſtake takes it and is poiſoned, murder; ſo in all caſes where malice intended to one *egreditur perſonam* 436, 441, 442, 467

Tho

Tho party take poiſon by the perſuaſion, but in abſence of another, perſuader is principal in the murder *Page* 436, 441, 442, 467

A. gives poiſon to *B.* intending to poiſon him, *B.* ignorantly gives it to another, who dies of it, murder in *A.* but *B. not guilty* 436

A. gives purging comfits to *B.* to make ſport only, he dies of it, manſlaughter ib

Various inſtances of killing, as by expoſing ſick perſons or infants, &c. 431, 432

A man infected with the plague goes abroad with intent to infect another, who is thereby infected and dies, whether murder 432

If a woman quick with child takes or another gives her a potion to cauſe abortion, or one ſtrikes her, whereby child within her is killed, it is a great miſpriſion, but no felony; ſo it is if ſuch child were born alive and baptized, and after die of the ſtroke given to the mother, not homicide [*ſed quære*]. 433

One counſels her before the birth to deſtroy it, and after child is born, and the woman deſtroys it accordingly, ſhe guilty of murder and procurer acceſſary ib

Killing one attaint of felony, otherwiſe than in execution of the ſentence by lawful officer is murder, or manſlaughter, according to the caſe 497

Homicide to kill one outlawed of felony ib

Sheriff beheads one condemned to be hanged, murder 454, 466, 501

5 *Eliz.* makes killing a man attaint in a *præmunire*, murder ib

Killing an *alien enemy* murder, unleſs *flagrante bello* ib

If there be an actual forcing a man, as if *A.* by force take the arm of *B.* and the weapon in his hand, and therewith mortally ſtabs *C.* murder in *A.* but *B. not guilty* *Page* 434

But otherwiſe of a moral force, as by dureſs, &c. ib

If *A.* command *B.* to beat *C.* and he beat him to death, murder in *B.* and in *A.* alſo, if preſent; if abſent, acceſſary 435, 440

A. indicted of murder, and *B.* as acceſſary *before* by procurement, *A.* is found guilty only of manſlaughter, *B.* ſhall be diſcharged 437

All preſent and aſſiſting to murder, principals ib

If *A.* is indicted, as having given mortal ſtroke, and *B.* and *C.* as preſent and aſſiſting, and on evidence it appears that *B.* gave the ſtroke, and *A.* and *C.* were only aiding and aſſiſting, it maintains indictment 437, 438

If *A.* lies in wait to kill *B.* and *C.* ſervant of *A.* being preſent takes part with his maſter, and ſervant or maſter kills *B.* murder in *A.* only, homicide in *C.* 437

A. having malice againſt *D.* maſter of *B.* by miſtake aſſaults and kills *B.* the ſervant, or *B.* comes in aid of his maſter, and *A.* kills him, murder in *A.* ib

On indictment of murder, tho party acquit thereof, and convict of manſlaughter, he ſhall receive judgment as if he had been indicted of manſlaughter, for offenſe in ſubſtance the ſame 499, 450, 466

If *A.* and *B.* and *C.* and divers others be engaged in an affray together, and *D.* the conſtable comes to appeaſe it, and *A.* knowing him to be ſuch kills him, and *B.* and *C.* not knowing it comes in, and finding *A.* and *D.* ſtruggling, aſſiſt and abet *A.* in killing the conſtable, murder in *A.* but manſlaughter in *B.* and *C.* but others of them, that did not know him, or abet, are *not guilty* 446

An abettor of murder and homicide muſt be preſent and aſſiſting ib

One procuring or abetting and abſent, only acceſſary in murder *Page* 439
If preſent, and not aiding and abetting to the felony, neither principal nor acceſſary, but looking on without uſing means to take felon, a miſpriſion 439, 448, 449, 593. ii. 75, 76
Divers of ſame party come to make an affray, &c. and come into one houſe, all are ſaid to be preſent, tho in another room 439
So are they ſaid to be, if they come into one park, tho at a diſtance from each other 465
One ready to aid, tho but a looker on, is a principal 439, 441
Divers come with one aſſent *male faire*, as to rob, kill, beat, or do any treſpaſs, and in doing it one kills a man, all principals 440, 441, 463
If *A.* come in company with *B.* to beat *C.* and *B.* beat him till he die, *A.* is a principal 472
A. and *B.* combat, *C.* comes to part them, *A.* kills *C.* murder in *A.* and *per aſcuns*, in both; but if falling out on a ſudden, then only manſlaughter in him that killed him 441, 442
A. with above thirty entered with force on a manor-houſe, and ouſted *B.* and his family; twenty others on part of *B.* three days after in the night came with weapons in order to re-enter, and one of them caſt fire into a thatcht houſe adjoining to the houſe; whereof one in the houſe ſhot off a gun, and killed one of the party of *B.* manſlaughter 440, 441
A man ſeiſeth goods of an *alien enemy*, and carries them to his houſe; a ſtranger under pretence of being deputy-admiral, with a great multitude came with force to the houſe, and at the gate made aſſault upon thoſe within, a woman iſſuing out, without any weapon, was killed by a ſervant, who came to take the goods, by throwing a ſtone at another in the gate; *per aſcuns*; if the woman came in defenſe of maſter of the houſe, it was murder in vice-admiral and his company; *per auters* no malice againſt the woman, and murder ſhall not be extended farther than intended; *per tout*, manſlaughter *Page* 441, 442
Divers come to commit a riotous, unlawful *act*, if in purſuit thereof one commit murder or manſlaughter, all of that party that committed the diſorder are guilty 442, 443, 463
But in that caſe it muſt be intended, when one of ſame party commits murder, &c. on one of the other party, or on thoſe, that come to appeaſe, or part them, or by law to diſperſe them 443
A. and *B.* fight upon premeditation, *A.* takes *C.* for his ſecond, *B.* takes *D.* *A.* kills *B.* murder in *C.* formerly held to be murder in *D.* alſo; but it ſeems otherwiſe 443, 452, 453
If one have no particular malice againſt any individual man, but comes with a general reſolution againſt all perſons, if *act* be unlawful, and death enſue, it is murder; as if it be to commit a riot, or enter into a park 444, 445, 466
A. and divers others come together to commit a riot, and in their march *A.* meets with *D.* with whom he had a former quarrel, or by reaſon of ſome collateral provocation given by *D.* to *A.* *A.* kills him without any abetting by his company, they not principals in the murder or manſlaughter 443, 444
Where many came to commit a diſſeiſin, and one killed, all the company arraigned as principals, and condemned; but it ſeemeth to be only manſlaughter 444
If many come together on an unlawful deſign, and one of the company

company kills one of the adverſe party without abetment of the reſt to the homicide, none guilty, but thoſe that gave the ſtroke, or actually abetted *Page* 444
Many come to remove a nuiſance committed in the highway, they are oppoſed by divers others, one of the former party ſtrikes one of the latter ſuddenly, and kills him without abetment of the reſt, he who ſtrikes is guilty of manſlaughter, reſt *not guilty* without abetment ib
But if it had been no nuiſance, reſt had been guilty 444, 445
If *A.* hath good title to his houſe, or be in poſſeſſion for three years (in which caſe he may detain by force by 8 *H.* 6.) if any perſon come to rob or kill him, and he ſhoot and kill him, no felony, nor forfeits he his goods, as in caſe of homicide *ſe defendendo* 445
But if *A.* come to enter with force [being ouſted], and in order thereto ſhoot at his houſe, and *B.* the poſſeſſor having other company in his houſe ſhoots and kills *A.* manſlaughter in *B.* ib
In this caſe, if *B.* ſhoot out of his houſe and kill *A.* not felony in the reſt of the houſhold; nay, tho he had hired an extraordinary guard (as by law he might), yet this not manſlaughter in the reſt of the company, becauſe aſſembly lawful ib
Actual abetting will make the reſt principals ib
Some preſent and abetting may be guilty of homicide, and not murder, others of murder ib
The maſter aſſaults another with malice prepenſe, ſervant ignorant of the malice, takes part with maſter, and kills the other, manſlaughter in ſervant, and murder in maſter 446
Wherein murder and manſlaughter differ 449, 466
In appeal of murder, whether jury may acquit, or muſt find party guilty of manſlaughter *Page* 449, 450
What malice conſtitutes murder 451
Malice in fact defined ib
The diſtinction of malice in law into its different kinds 451, 455
From what circumſtances evidences of malice in fact muſt ariſe 451
It muſt be compaſſing ſome bodily harm ib
A long ſuit in law not ſufficient evidence of malice in fact, but how it may be heightened into malice prepenſe 452
A. and *B.* are at malice, and reconciled, and after on a new occaſion fall out, and one kills the other, not murder; *contra*, if reconciliation counterfeit ib
If malice between *A.* and *B.* and they meet and fight, *A.* gives firſt blow, yet if *B.* kill him (otherwiſe than in his own defenſe) it is murder ib
If malice between them, and *A.* aſſault *B.* and after flies to the wall, and there in his own defenſe kill *B.* by ſome it is murder; *ſed quære* ib
A quarrel between *A.* and *B.* *A.* challenges *B.* *B.* declines it, but at length to vindicate his reputation meets and fights, and kills *A.* murder 452, 453
A. challenges *B.* *B.* declines it, but ſignifies that he will defend himſelf, if *B.* going about his occaſions is aſſaulted by *A.* and killed, murder in *A.* but if *B.* had killed *A.* it had been *ſe defendendo*, if he could not eſcape, otherwiſe manſlaughter; but if only a diſguiſe, murder 453
If *A.* and *B.* fall out on a ſudden, and preſently agree to fight, and each fetcheth a weapon, and goes into the field, and one kills the other, only manſlaughter; if they had time to deliberate, murder ib
The child of *A.* beats child of *B.* who runs home to his father, and

and he runs three quarters of a mile, beats the other child, and kills him, manſlaughter *Page* 453
Keeper of a park finding a boy ſtealing wood bound him to his horſe's tail, and beat him, horſe ran away, killed the child, murder 454
From moderate correction of a ſervant death caſually enſues, homicide *per infortunium* ib
But if maſter deſign immoderate correction, or ſtrike with a lethal weapon, and kills ſervant, murder; what circumſtances conſiderable in this caſe 454, 474
One hath liberty of *infangthief*, ſteward gives judgment of death againſt a priſoner againſt law, not murder, *quia factum judicialiter, licèt ignoranter* 454
Killing without provocation, murder 455
Wilfully poiſoning implies malice ib
Killing one come to demand debt, or ſerve proceſs, murder ib
A. diſtorts his mouth, and laughs at *B. who* thereon kills him, murder ib
A. paſſing the ſtreet, *B.* takes the wall, and thereupon *A.* kills him, murder; but if *B.* had juſtled *A.* it had been only manſlaughter; ſo if *A.* riding on the road, *B.* whips his horſe out of the track, and then *A.* lighting kills *B.* manſlaughter 455, 456
Words no provocation to kill a man, nor will they leſſen a crime from murder to manſlaughter, except words of menace of bodily harm 456
If *A.* give indecent language to *B.* and *B.* thereon ſtrikes *A.* but not mortally, and then *A.* ſtrikes *B.* again, and then *B.* kills *A. by many* only manſlaughter ib
A. ſitting in an ale-houſe, a woman calls him a *Son of a whore*, *A.* at a diſtance throws a broom-ſtaff at her, and kills her; *quære*, whether murder or manſlaughter *Page* 456
The nature of the weapon, wherewith party is killed, conſidered 457
A. and *B.* at difference, *A.* bids *B.* take a pin out of his ſleeve to take occaſion to ſtrike *B. B.* doth accordingly, *A.* ſtrikes *B.* whereof he dies, murder ib
A chiding between huſband and wife, thereon he ſtrikes her with a peſtle, and kills her, murder ib
A bailiff comes to execute a proceſs, but hath not a lawful warrant, if ſuch bailiff be killed, only manſlaughter ib
If any miniſter of juſtice be killed doing his office, it is murder, tho in the night, or on a Sunday 457. ii. 85
But if the proceſs be executed out of juriſdiction of the court, only manſlaughter; ſo it is, if court had no juriſdiction of proceſs 458
Murder to kill an officer, tho he ſhew not his warrant or mace, where it is not demanded 458, 462
Tho bailiff uſe no words of arreſt nor ſhews his warrant, murder to kill him doing his duty ib
But if officer doth what is not warrantable, as break open window to arreſt, there, if ſlain, manſlaughter only 458, 474
If he enter by an outward door, he may break open inner door, killing him in ſuch caſe, murder 458, 459
Where officers may juſtify breaking open doors to arreſt, and conſequently murder to kill them ſo doing 459. ii. 94
Where conſtable acts out of his vill without a ſpecial warrant, killing him only manſlaughter; but killing a private man in execution of a particular precept from a juſtice of peace directed to him by name to ſuppreſs a riot in the vill of *B.* or to arreſt one for ſome miſdemeanor, and within

within the juriſdiction of the juſtice, murder; ſuch private man muſt ſhew his warrant, or ſignify the contents *Page* 459
If juſtices warrant expreſs not the cauſe ſufficiently enough, yet if he had juriſdiction, killing officer in execution of it, murder 460
Where two conſtables and their aſſiſtants are engaged one againſt another, and party of one conſtable kills one of the other party, but manſlaughter ib
Sheriff having a writ of poſſeſſion againſt houſe of *A.* *A.* gains conſtable of vill to oppoſe ſheriff, and in conflict conſtable is killed, not ſo much as manſlaughter; but if any of ſheriff's officers are killed, murder ib
Killing bailiff, conſtable or watchman doing his duty; murder 457, 460, 463. ii. 90, 98
What ſufficient notice that a man is a bailiff, conſtable or watchman, to make it murder 460 to 464. ii. 90
What a neceſſary notification of a man's being a private bailiff 461
Rioters aſſembled in a houſe, ſome iſſue out and kill a conſtable's aſſiſtant within view, murder in thoſe in the houſe, who abetted the aſſault 463, 464
Killing thoſe, that come voluntarily to a conſtable's aſſiſtance, as well as thoſe that are called, murder ib
Killing aſſiſting during neceſſary retreat of conſtable, murder ib
On *hue* and *cry*, tho without juſtice's warrant, or conſtable a purſuant is killed by a malefactor, murder; all malefactors in the ſame field principals; one taken before party hurt, *not guilty*, unleſs after taken he had animated malefactor to kill the party 465. ii. 100
A preſs-maſter impreſſed *B.* and with aſſiſtance of *C.* laid hold on him, *D.* finding fault with *C.*'s rudeneſs a quarrel aroſe, *D.* killed *C.* but manſlaughter ib
A. comes to rob *B.* and either without, or on reſiſtance, *A.* kills him, murder *Page* 465, 474
So if men come to ſteal deer in a park, or rob a warren, and parker or warrener reſiſts, and is killed, murder ib
If priſoner die by dureſs of gaoler, murder 466
What the form of pardon of murder, what of manſlaughter: Where a ſpecial *non obſtante* of 13 *R.* 2 neceſſary 466, 467
How one indicted of murder having a pardon of felony, or *felonica interfectio* muſt plead 467
1 *Jac.* of *ſtabbing*, tho temporary, by 17 *Car.* 1. continued till ſome other *act* ſhould be made to continue, or diſcontinue it 468
Uſual to prefer two indictments, one of murder, another on this *act*, and to try that of murder firſt, convict on either, ouſted of clergy ib
How indictment on this *act* muſt be to ouſt clergy; need not conclude *contra formam ſtat.* good with, or without it ib
Throwing a hammer and killing a man, not a ſtabbing or thruſting within this *act* 469, 470
Stabbing, or thruſting with a ſword or pike-ſtaff within it; whether a ſhot with a piſtol, or blow with a ſword or ſtaff be within it, *quære* 470
A cudgel in the deceaſed's hands, a weapon drawn within it, *viz.* ſuch as might do hurt ib
One within words of the *act*, not within the reaſon ib
If a maſon in building voluntarily let fall a ſtone, and kill another, without due warning, at leaſt manſlaughter 472, 475
Two playing at cudgels, or wreſtling by conſent, or playing at foils, one caſually kills the other, manſlaughter 472, 473
If *A.* cut the hedges of *B.* and *B.* beat him, whereof he dies; manſlaughter 473

Several

Several come to enter *A.*'s houſe as treſpaſſers, *A.* kills one of them, manſlaughter *Page* 474
If one throws a ſtone over an houſe amongſt people to do hurt, the intention makes it murder or manſlaughter 475
Shooting at deer in another's park *ſans licence*, the arrow glanceth and kills, manſlaughter ib
Throwing a ſtone with intent to kill another's poultry, and it kills a by-ſtander, manſlaughter ib
A. drives his cart carelefly, and it runs over a child in the ſtreet, and yet drives on, and kills the child, murder; but if he ſaw it not, manſlaughter 476
One riding in the ſtreet whips his horſe, and runs over a child and kills him, manſlaughter ib
But if he rid ſo in a preſs of people to do hurt, and horſe had killed another, murder ib
If there be malice between *A.* and *B.* and they meet and fight upon it, tho *A.* gives firſt blow, and *B.* retreats as far as he can with ſafety, yet if *B.* kill him, murder 479
A. aſſaults *B.*, *B.* thereon ſtrikes *A.* without flight, and kills him, manſlaughter ib
If *A.* upon malice prepenſe ſtrikes *B.* and then flies to the wall, and there in his own defenſe kills *B.* under what circumſtances murder, or *ſe defendendo* 480
If a priſoner reſiſts not, but flies, yet officer for fear of a reſcue ſtrikes him, whereof he dies, murder 481
Bailiff killing a man flying to avoid arreſt in a civil action, murder ib
If *A.* aſſaults *B.* firſt, and *B.* reaſſaults *A.* and ſo fiercely, that *A.* cannot retreat to the wall without danger; nay, tho he fall on the ground upon *B.*'s aſſault, and then kills *B.* it is not *ſe defendendo*, but murder or homicide according to the caſe 482
Neceſſity of flying ſhall not be taken as a flight, in favour of aſſailant *Page* 482
A. aſſaults *B.* *B.* by his own courage and addreſs precludes flight of *A.* then *A.* kills him, manſlaughter 483
Killing on a ſudden falling out, manſlaughter ib
A. aſſaults the maſter, and ſervant in defenſe of him kills *A.* if maſter not driven to extremity manſlaughter in ſervant 484
Like law of a maſter killing in defenſe of his ſervant; huſband of the wife, the child of the parent, and *è converſo* ib
If huſband or father kill one that attempts to raviſh the wife or daughter, if it might have been otherwiſe prevented, manſlaughter 485
Killing one, who pretending title takes goods as a treſpaſſer, manſlaughter 485, 486
Killing a treſpaſſer in defenſe of a man's houſe, manſlaughter 485, 487
Killing adulterer in the act with the wife, manſlaughter ib
A. is ſuſpected by *B.* of felony, tho no felony committed, neither is *A.* indicted, nor probable cauſe of ſuſpicion, if on offer to arreſt him by *B.* he reſiſts or flies, whereby *B.* cannot take him without killing, and *B.* kills him, at leaſt manſlaughter; but if a felony committed, and there be cauſe to ſuſpect *A.* tho innocent, if *B.* kill *A.* in this purſuit, whether it excuſe him from manſlaughter 490
If a man have a park within a foreſt, where he may hunt, and foreſter kills purloin-man, or his ſervant hunting in his purloin, murder or manſlaughter according to the caſe 491
What authority *homicide in execution of juſtice* requires in the judge that gives, and officer that ex-

executes judgment *Page* 497, 498, 499
Giving judgment of death without juriſdiction, if executed, murder 497
Juſtice of peace gives judgment in treaſon, whether murder or miſpriſion only 497, 498
Where proceeding of judges in capitals without ſtrict extent of their commiſſion, or where their proceeding after their commiſſion is determined, is not murder, but a great miſpriſion 498, 499
Executing martial law in time of peace, murder 499, 500
Where the judge hath juriſdiction of the cauſe, officer executing ſentence *not guilty*, tho the judge err; but otherwiſe, if he hath no juriſdiction 501
If a ſtranger of his own head execute criminal, murder ib
If a private man kills one ſuſpected on his flight, and refuſing to ſubmit, if innocent, at leaſt manſlaughter, becauſe innocent man not bound to take notice of private man, as authorized to arreſt him ii. 82, 83
If one arreſting on ſuſpicion break open doors, if party a felon, juſtifiable; *contra*, if innocent ii. 82
If before or after arreſt, *B.* an innocent man ſuſpected, draws his ſword and aſſaults *A.* the party ſuſpecting, and *A.* preſſes upon him to take or detain him, and in conflict *B.* kills *A.* it is murder, or if *A.* kills *B.* it is juſtifiable ii. 83
If one arreſted on ſuſpicion kills party arreſting, (always ſuppoſing party arreſted innocent,) only manſlaughter ii. 84
Bailiff about to take a priſoner, before arreſt priſoner draws his ſword, and kills him, murder ii. 83
If there be a felony done, *A.* ſuſpects *B.* on probable grounds, and acquaints conſtable with it, and deſires his aid to take him, if conſtable on ſuch arreſt or attempt thereof be killed, it is murder ii. *Page* 92
If there be a warrant againſt one for treſpaſs, or breach of the peace, and he flies, and will not yield to the arreſt, or being taken makes his eſcape, and officer kills him, murder ii. 117
Vide **Arreſt, Clergy, Homicide per tout, Indictment.**

Mute.

If priſoner proſecuted on 28 *H.* 8. *for trial of treaſon*, &c. *on the high ſea* ſtand mute, he ſhall have *peine fort & dure* ii. 17, 318, 319
Whether *peine fort & dure* be pardoned by general words of all contempts ii. 252
In caſe of demurrer no ſuch judgment can be given ii. 257, 315
Where defendant fails in pleading *not guilty*, or putting himſelf on his country, it is in law a ſtanding mute ii. 258
Antiently, if felon peremptorily challenged above thirty-five, he was put to *peine fort & dure* ii. 268
If before 22 *H.* 8. felon had pleaded *not guilty*, and put himſelf on the country, and challenged peremptorily under three juries, whereby jury remained, and a *tales* was granted, and he then ſtood mute, yet jury paſt on him on his plea *not guilty* ii. 269, 316
If priſoner hath pleaded to the country, and when tried ſays nothing, no penance ſhall be inflicted, but jury ſhall be taken ii. 299
If felon challenge above twenty, challenge only over-ruled, and jurors ſworn ii. 270, 316
If he hath received his judgment already, or be convict, and brought to the bar, and be demanded what he can ſay why judgment ſhould not be given againſt

againſt him, or why execution ſhould not be awarded, if he ſay nothing, it ſhall not be inquired whether he can ſpeak or not, but he ſhall have preſent judgment, or execution ii. *Page* 314, 315

But if a long time hath paſſed between his conviction and judgment and this ſecond calling to the bar, it is prudent to inquire by witneſſes, whether he can ſpeak ii. 315

If one abjure, or be outlawed of felony and return, and be brought to the bar to ſhew cauſe, why execution ſhould not be done, if he ſtand mute, an inqueſt of office is to be taken, and if it be found that he hath loſt his ſpeech by viſitation of God ſince his abjuration, they ſhall inquire of the identity of the perſon before judgment or execution ſhall be awarded; ſo if he were brought in on a *cap. utlegat.* or *hab. corpus* ib

If one indicted or appealed of felony pleads *not guilty*, and puts himſelf on the country, and jury remains on challenges till another day, and then appear, and priſoner ſtands mute, yet this not ſtanding mute, for inqueſt ſhall be taken on iſſue already joined ii. 315, 316

In that caſe court having any doubt, hath uſed to inquire by inqueſt, ſometimes by inquiry *ex officio* by inqueſt impannelled to try the iſſue, whether he ſtands mute of malice, or *ex viſitatione Dei* ii. 315, 316, 321

When one ſaid to ſtand mute ii. 316, 317

If felon ſtand mute, court *ex officio* ought to impannel a jury as inqueſt of office to try, whether it be of malice, or not; and if they find it to be of malice, he ſhall have judgment of *peine fort & dure*, if otherwiſe, they are to inquire of all the points material for his defenſe ii. 317

On indictment of treaſon judgment of treaſon ſhall be given againſt party ſtanding mute ii. *Page* 317

In treaſon, tho one ſtanding mute ſhall be convicted, yet there are ſome antient inſtances to the contrary, as on indictment for counterfeiting coin, but now the law is otherwiſe 223, 328

One arraigned for petit treaſon, challenging above thirty-five ſhall have judgment of *peine fort & dure*, and how judgment entered 382. ii. 268, 399, 400

In appeal, if appellee ſtand mute, judgment of penance ſhall be given ii. 317, 321, 322

One arraigned before lord ſteward on 33 *H.* 8. and ſtanding mute, ſhall have judgment, as if convicted ii. 318

Peer arraigned on indictment of felony before his peers refuſing to plead, ſhall have this judgment ib

A woman ſhall have ſame judgment if ſhe ſtand mute ib

One indicted of petit larciny refuſing to plead ſhall have the ſame ii. 320

If a woman be indicted for ſimple larciny of goods under 10*s.* tho ſhe ſhall only be burnt in the hand for it, yet if ſhe refuſe to plead, judgment of *peine fort & dure* ſhall be given againſt her ib

If a new felony be made by *ſtat.* tho it be ſilent as to ſtanding mute, this judgment incident to it ib

In rape, made felony by *Weſtm.* 2. if party ſtand mute, he ſhall have judgment of penance ib

If this judgment be given, yet if offenſe within clergy, clergy allowed ib

Priſoner to have *trina admonitio* and a reſpite to bethink himſelf ib

Judge to hear witneſſes on oath to give a probable teſtimony of his guilt ii. 321, 322

If the offenſe be within clergy duty of judge to allow it, tho not prayed,

prayed, and that as well after judgment pronounced, as before ii. *Page* 321, 323
Judgment of penance was by common law ii. 321
One indicted of felony before juſtices of *oyer* and *terminer*, *&c.* is convict, if record of conviction be removed into *B. R.* and the priſoner alſo, he ſhall be demanded what he can ſay, why execution ſhould not be awarded on record removed; if he ſay nothing, it ſhall be inquired by inqueſt of office, whether ſame perſon ii. 401, 402, 407
How judgment of *peine fort & dure* entered, where priſoner doth not directly anſwer ii. 399
How entered where he ſtands wholly mute ii. 400

Neceſſity.

NECESSITY of preſerving the peace by taking notorious malefactors excuſeth ſome acts from being felony, which otherwiſe were felony 53
The dangerous doctrine of the *caſuiſts* on this ſubject refuted 54, 55
By the laws of *England*, if one being under a neceſſity for want of victuals or clothes, ſhall on that account clandeſtinely, *& animo furandi* ſteal another man's goods it is capital 54
This rule, *in caſu extremæ neceſſitatis omnia ſunt communia*, holds in ſome particular caſes, where by tacit conſent of nations, or ſome particular countries or ſocieties, it hath obtained 55
If king's enemies come into a county with a power too ſtrong for county to reſiſt, and will plunder the country, unleſs a compoſition be made with them, ſuch a ranſoming themſelves is ſo far from being treaſon, that it hath been allowed as lawful, and in what reſpects 57
Joining with rebels *pro timore mortis* and departing from them as ſoon as parties can, no levying war *Page* 139
Quicquid neceſſitas cogit, defendit, refuted 565
Difference between times of war and public inſurrection or rebellion, and times of peace, for in times of war and public rebellion, when one is under ſo great a power, that he cannot reſiſt or avoid it, law in ſome caſes allows an impunity for parties compelled, or drawn by fear of death to do ſome acts in themſelves capital, which admit no excuſe in time of peace 49
But if whole circumſtances of caſe be ſuch, that he can conveniently reſiſt or avoid the power of the rebels, he is not excuſed; if on pretenſe of fear or doubt of compulſion, he aſſiſt them 51
If a man be menaced with death, unleſs he will commit an act of treaſon, *&c.* fear of death doth not excuſe him, and why ib
If one be deſperately aſſaulted, and in peril of death, and cannot otherwiſe eſcape, unleſs to ſatisfy his aſſailant's fury he will kill an innocent man then preſent, fear and actual force will not acquit him of murder, if he do the fact ib
A bare fear, tho upon a juſt cauſe, and tho it be fear of life, gives not a man power to take away life of another, but what kind of danger it muſt be 52
Where *vis major quam reſiſti poteſt* excuſeth in criminal, tho not in civil actions 139
Conſcience binds not one to keep an oath extorted by menace of death 532
One of neceſſity kills a felon or ſuſpected perſon flying or reſiſting before, or after arreſt, where homicide juſtifiable, or excuſed. Vide Homicide.

Non-feaſance. Vide Infant.

Non obſtante.

Prohibitory clauſe in 8 *R.* 2. that *no man of law ſhall be juſtice in his own county*, uſually diſpenſed with by a *non obſtante* ii. *Page* 32

Notice. Vide Ignorance.

Nul tiel Record. Vide Pleas.

Oath. Vide Alligeance

Overt Act. Vide Treaſon.

Outlawry.

AT what age awardable againſt an infant for felony on indictment 23. ii. 208

Poſſibly proceſs of outlawry may go againſt receiver of a traitor at ſame time as againſt principal, and tho principal appear, proceſs may go on againſt the other; *contra* in felony 238

A traitor rendering himſelf on outlawry within a year ſhall be received to traverſe indictment 295

What *acts* take away from perſon outlawed for treaſon advantage of reverſal of outlawry, becauſe *party out of the realm*, but extend not to other offenſes 354

Where juſtices of *oyer* and *terminer* may iſſue proceſs of outlawry ii. 31

On inquiſition before coroner returned before juſtices of *gaol-delivery*, they cannot make proceſs of outlawry ii. 37

They cannot make out *cap.* or *exigent* ii. 199

A. and *B.* indicted before juſtices of peace, indictment delivered over to juſtices of *gaol-delivery*, *A.* appears and is acquit, *B.* appears not, record muſt be removed into *B. R.* and thence proceſs of outlawry iſſued ii. 37, 38

Juſtices of peace by common law in their ſeſſions may proceed to outlawry on indictments found before them, and in popular actions by ſtatutes ii. *Page* 52

21 *Jac.* gave proceſs of outlawry in popular actions ii. 113

But they cannot iſſue *capias utlegatum*, but muſt return record of outlawry into *B. R.* and thence it ſhall iſſue ib

Whether coroner can make out proceſs of outlawry againſt defendant in appeal ii. 67, 199

Where proceſs of outlawry lies againſt a *peer*, or not ii. 177, 199, 200

In ſome caſes on indictment it lies not againſt a commoner ii. 194

Whether outlawry an attainder 521. ii. 205, 206, 350, 352

Tho attainder, yet ſmall exceptions are allowed to proceſs or return, and ſo by writ of error eaſily reverſible, and party put to plead to indictment ii. 198

One outlawed prays reſpite to purchaſe a writ of error, *B. R.* uſually prefixeth a day for that purpoſe, and in mean time remits him to marſhal, and reſpites his execution; but priſoner muſt alledge error in law or fact to ſatisfaction of court; if court diſſatisfied, they may award execution preſently ii. 408

One attaint by outlawry of treaſon, *&c.* ſhall not be appealed or indicted till outlawry reverſed ii. 252

If two coroners in a county, or more, one may execute the writ, as in caſe of an *exigent*; but return muſt be in name of *coronatores* 417. ii. 56, 195

By 5 *E.* 3. juſtices of *oyer* and *terminer* may iſſue proceſs againſt felons in a foreign county 576

In whoſe name, and under whoſe *teſte* ſuch proceſs ſhall iſſue; clerk of aſſiſe has a ſpecial ſeal for them 576. ii. 199

Tho indictments be not diſcontinued by demiſe of *king*, in ſome caſes

caſes proceſs are ii. *Page* 189, 209
In indictments of treſpaſs, *venire facias* firſt proceſs, and when *non eſt inventus* is returned, *cap.* and *exigent* ii. 194
In all indictments of felony or treaſon proceſs by *cap.* and *exigent* lies, and at common law there was but one *cap.* and on *non eſt inventus* and *exigent*, and ſo to the outlawry 576. ii. 194
In what caſes 25 *E.* 3. requires two *capias*'s, and how ſecond *capias* returnable ii. 194
It extends not to treaſon; *exigent* in treaſon muſt iſſue on return of *non eſt inventus* on firſt *cap.* ib
So in indictment of murder or appeal of robbery, but in *B. R.* there ſhall be two *cap.* in indictment or appeal of robbery ib
At this day proceſs on indictment of any felony is only one *cap.* and then *exigent* ii. 195
25 *E.* 3. an impracticable law ib
But by 8 *H.* 6. in indictments or appeals of treaſon, or any felony or treſpaſs againſt one of another county, after one *cap.* a ſecond *cap.* with *proclamations*, and how returnable, ſhall be granted to ſheriff of that county, wherein he is ſuppoſed to be converſant, before *exigent* ſhall iſſue 576. ii. 195
But if party were converſant in county, where indicted, at time of felony or treaſon committed, proceſs to be at common law ib
A *proviſo* in 8 *H.* 6. not to extend to *B. R.* or *Cheſter* ii. 195
By 10 *H.* 6. ſame proceſs [as by 8 *H.* 6.] directed on indictment of felony or treaſon removed into *B. R.* by *certiorari*, or into any other courts ib
Indictments of felony or treaſon originally taken in *B. R.* are not within theſe *acts*, but by 6 *H.* 6. before *exigent* awarded court ſhall iſſue a *cap.* to ſheriff of county, where indictment taken, and another to ſheriff, where party is named, having ſix weeks time at leaſt before the return ii. *Page* 195
6. *H.* 6. made perpetual by 8 *H.* 6. 576
Theſe *acts* of little effect; for if party was conveyed in county, where fact committed, (as he cannot be otherwiſe) then he may be named of that place in indictment, and proceſs is to go as at common law before theſe *acts*; and this is now the uſual courſe ii. 196
If *J. S.* be indicted in county of *B.* for a felony there committed, and indictment runs *J. S. nuper de* A. *in com.* B. *alias dict.* J. S. *nuper de* D. *in com.* S. there ſhall no proceſs go to ſheriff of *S.* becauſe that addition is only in the *alias dictus*, and therefore proceſs ſhall only iſſue in county of *B.* and ſame law in appeal ib
If it runs, J. S. *de* A. *in com.* B. *nuper de* C. *in com.* D. *cap.* ſhall iſſue only *in com.* B. but if it runs, J. S. *nuper de* A. *in com.* B. *nuper de* C. *in com.* D. a *cap.* ſhall only go into the county of *B.* where he is indicted, but on return thereof, (if it be before commiſſioners) a *cap.* with proclamations ſhall iſſue to ſheriff of *D.* and if in *B. R.* on an indictment found there, one *cap.* to one ſheriff, and another to the other ſheriff, according to 6, 8 & 10 *H.* 6. ib
If one be indicted by name of J. S. *nuper de* A. *in com.* Ceſtriæ, the ſecond *cap.* with proclamation ſhall be awarded to the *prince*, or his lieutenant, and the like to biſhop of *Durham*, or chancellor of *Lancaſter* ii. 196, 197
Expoſition on 2 *H.* 5. enabling the chancellor on complaint of any felony or riot to iſſue a *cap.* and writ of proclamation ii. 197
Tho this be marked as an obſolete ſtatute, no *act* repeals it, ſave implication of 16 *C.* 1. which it ſeems not to do ib

Yet never put in ure ii. *Page* 198
B. R. either on indictment taken before them, or removed thither by *certiorari*, may iſſue *cap.* and *exigent* into any county in *England* on a *non eſt inventus* returned by ſheriff of county, where party indicted, and a *teſtatum* that he is in ſome other county ib
In appeal by writ againſt principal and acceſſary, which is general till declaration, plaintiff muſt at his peril diſtinguiſh the proceſs, for if he take his *exigent* againſt all, he muſt count againſt all his principals ii. 200
But in appeal by bill or indictment, *cap.* is againſt them all, but when it comes to the *exigent*, it ſhall iſſue only againſt principal, and proceſs be continued by *cap.* infinite againſt acceſſary till principal be outlawed, and then *exigent* ſhall iſſue againſt acceſſary ib
If acceſſary appear on *cap.* he ſhall not be let to bail, and have *idem dies* by bail till proceſs be determined againſt principal ib
If two be indicted as principals in felony, and another as acceſſary to them both, *exigent* againſt acceſſary ſhall ſtay till both be attainted by outlawry or plea ib
If one of the principals be acquitted, whether acceſſary ſhall be diſcharged 624. ii. 200, 201
Whether there be any, and what diverſity in this caſe between indictment and appeal ii. 201
If defendant render himſelf to ſheriff before *quinto exactus*, and appear in court at return of the *exigent*, and plead, and is bailed, and then makes default, inqueſt ſhall not be taken by default in felony, either in indictment or appeal, tho it may in other caſes, but a new *cap.* ſhall iſſue, and after that an *exigent*, and a *cap.* againſt the bail ii. 201, 202
Where *exigi fac.* with an *allocato comitatu* ſhall iſſue, and where *exigi fac. de novo* ib
Demand of party to be at five county-courts ſucceſſively held one after another, without any court intervening ii. *Page* 201
If where there are but two county-courts before return, if after ſecond *exactus* defendant render himſelf, and find *mainprize*, and at return make default, there ſhall iſſue no *exigi fac.* with an *allocato com.* but a new *exigent*, and a *cap.* againſt the bail ii. 201, 202
How an *exigi fac.* with *allocato huſting* proceeded on ii. 202
If defendant appear on *cap.* and plead to iſſue, and is then let to bail, and then makes default, a *cap. ad audiendam juratam* ſhall iſſue, and if not taken thereon, *exigi fac. de novo*; but if brought in, he ſhall be tried on his plea ii. 202, 224
But if he render himſelf on *exigent*, and plead *not guilty*, and be let to bail till trial, and then make default, whereon *exigent* is awarded, and he is brought in thereon, he ſhall plead, and be arraigned *de novo*, for by *exigent* awarded firſt iſſue is diſcontinued ii. 224
If on *cap.* or *exigent* ſheriff return a *cepi corpus*, and at the day hath not the body, he ſhall be puniſhed, but no new *exigent* awarded, becauſe in cuſtody of record ii. 202
But if party returned outlawed, proceſs *cap. utlegatum* ib
If party outlawed be in a houſe, and doors refuſed to be opened, conſtable, or any other perſon in purſuit of one outlawed for felony, may break open doors and take him ii. 203
What certainties return of outlawry muſt have ii. 203, 204
Where a *certiorari* iſſued to coroners to certify the truth in order to amend return of outlawry ii. 03
Goods forfeited from *teſte* of *exigent* ii. 204, 206

In

In appeal, if *exigent* be well awarded, tho writ of appeal abated, forfeiture of goods by *exigent* ſtands in force *Page* 204
Tho outlawry be reverſed for error in law or fact, *exigent* being well awarded, forfeiture of goods ſtands ii. 204, 205
Special writ of error lies on award of *exigent* for party or his executors to reverſe award of *exigent* ii. 205
Inſtances of errors in fact ii. 205, 207, 208
Avoiding outlawry avoids not *exigent*, if well awarded ii. 205
If party render himſelf after *exigent* awarded, and plead to indictment, and is found *not guilty*, forfeiture by *exigent* ſtands ib
Neceſſary for party outlawed in felony to bring his writ of error ſpecially, *tam in adjudicatione brevis de exigi facias, quàm in promulgatione utlegariæ* ib
Error in *exigent* cauſe to reverſe outlawry, and error in appeal or indictment, on which *exigent* is awarded, is cauſe to reverſe both outlawry and *exigent* ib
Without judgment of reverſal in a writ of error forfeiture by *exigent* awarded ſtands, tho indictment quaſhed, or appeal abated ib
Outlawry gives forfeiture of lands in treaſon to the *king*, and in felony to *lord* ii. 206
But bare judgment of outlawry without return of record is no attainder, nor gives any eſcheat ib
It muſt be returned by ſheriff with writ of *exigi facias*, and return indorſed ib
If there be a *quinto exactus*, and thereon *utlegatus eſt per judicium coronatorum*, but no return thereof made, there lies a *certiorari* to the coroners, or ſheriff and coroners, to certify fame in *B. R.* and for what purpoſe ib
Till return by ſheriff party outlawed not diſabled to bring an action ib
Barely on return of outlawry on a *certiorari* without *exigent* indorſed and returned together with *certiorari*, no writ of eſcheat lies for the lord ii. *Page* 206
If *certiorari* be directed to ſheriff and coroners, and *exigent* be extant in court, and they return this outlawry, poſſibly it may be a ſufficient warrant to enter it of record as a return on the *exigent* ib
Unleſs *exigent* is ſome way returned or extant, it gives *king* no title to land or goods, it is the warrant of the outlawry ii. 207
Without *exigent* and return of outlawry on it there is neither diſability, forfeiture, nor eſcheat ib
A *certiorari* not grantable to coroners to remove outlawry after party's death ib
Outlawry avoidable by plea, by writ of *identitate nominis*, or by writ of error ib
No errror in fact, if *defendant be impriſoned*, provided he be brought to the bar, and demanded, if he will appear and refuſe ii. 208
Of avoiding outlawry of felony becauſe *beyond ſea*; the diſtinctions, where one goes *beyond ſea* voluntarily, or in *king*'s ſervice, and where he goes before *exigent* awarded, or after ib
How errors in theſe caſes are aſſigned; how attorney general to plead to the errors, *&c.* ib
Error brought on outlawry in felony, record of outlawry *cum omnibus ea tangentibus* is removed into *B. R.* ii. 209
Party muſt render himſelf in cuſtody, and ſo muſt come in perſon to the bar, and when demanded what he can ſay, he is to pray allowance of writ of error ib
Writ being allowed, record is to be removed; what parts record conſiſts of ib
Then party to aſſign errors in perſon, and a day is given to *king*'s attorney to reply to him, and in mean time a *ſcire fac.* to *lord*

mediate & immediate is to iſſue, returnable at fifteen days *ad audiendum errores* ii. *Page* 209
If any lords appear, they may plead to the errors; if ſheriff returns *there is no land*, then court proceeds to examine errors ib
Outlawry being reverſed, defendant to anſwer indictment; where indictment to be tried ib
For forfeiture by outlawry and to what time it ſhall relate. Vide Forfeiture.
What judgment in outlawry of felony or treaſon, and what award of execution to be made. Vide Judgment.
Vide Gaol-delivery, Juſtice of Peace, Oyer and Terminer.

Oyer and Terminer.

Juſtices muſt be by commiſſion, and not writ, otherwiſe their proceedings void 498. ii. 23
May iſſue warrants in the counties within their commiſſion for taking felons or ſurety of peace within their limits 579
Quære, whether they may not iſſue their warrants to take any indicted of felony within their precincts; tho they be abroad in a foreign county, by 5 *E.* 3. ib
Diſtinction between ordinary and delegate, juſtices of *oyer* and *terminer* ii. 22
To whom commiſſion directed, and how it runs ii. 22, 23
Commiſſioners before their ſeſſions iſſue a precept in writing to ſheriff to return a jury of ſame form, as commiſſioners of *gaol-delivery* do, but precept by juſtices of *gaol-delivery* may be *ore tenus* ii. 23, 34
The ſubſtance of the precept ii. 26, 27
Others may be added, or their power contracted by *aſſociation*, or *ſi non omnes*, and ſo in commiſſions of *gaol-delivery* ii. 23
One ſitting without adjournment determines their commiſſion, but tho appointed *pro hâc vice* only, they may continue their ſeſſion from day to day by adjournment; the like for all other commiſſions *Page* 498, 499. ii. 24
Not always neceſſary to enter adjournment on record, (tho in many caſes fit), and if not entered, ſeſſion relates to firſt day, and records are entered as of that day ii. 24
Where neceſſary to enter their adjournment ii. 24, 261
How many ways theſe commiſſions are determined ii. 24, 25
Superſedeas ſuſpends their power, *procedendo* revives it ii. 25
How many kinds of notice of a new commiſſion determines the former 499. ii. 25
Where a general commiſſion is determined *pro tanto* by a ſpecial commiſſion ii. 21, 25
Where a ſpecial by a general, or not ib
If there be a general commiſſion, and a ſpecial one for a franchiſe, &c. *infra com.* both dated ſame day, both ſtand ii. 26
General commiſſion extends *tàm infra libertates, quàm extra* ib
Regularly they cannot proceed on any indictment taken before others than themſelves, and therefore they cannot proceed on coroner's inqueſt or indictment of felony before juſtices of peace ii. 21, 27
This rule extends only to general commiſſions ii. 27
Not to inquiſitions taken before other commiſſioners of *oyer* and *terminer* ib
A general power is given by ſtatute to juſtices of *oyer* and *terminer* to proceed on indictments taken by former juſtices ii. 27, 405
How precept to return a jury ought to be, and how the ſheriff ought to return it ii. 26, 27, 260, 261
Whether they may proceed ſame ſeſſions againſt a party indicted before them ii. 28, 29, 261

Differ-

Difference, where party in priſon, or at large ii. *Page* 29
Difference between treaſons and felonies, and other crimes ib
Whether, if cognizance of an offenſe be limited to *any court of record*, it may be heard and determined by them ib
They cannot aſſign a coroner ii. 31
Where by ſtatute, they may iſſue proceſs of outlawry into any county, and a *capias utlegatum* ii. 31, 199
They are to ſend their records determined into the *Exchequer*, but to take out their eſtretes firſt ii. 31
How their precepts and proceſſes are to be ſigned and ſealed ib
How they antiently made their warrants for execution of capital offenders ib
They cannot deliver priſoners by proclamation ii. 34
May originally take indictments of felony of priſoners in gaol ib
Juſtices of *oyer* and *terminer*, *gaol-delivery*, and the peace may make up their record by all three of their powers, and beſt ſhall be taken for the *king* ii. 34, 166
They may take indictments of treaſon, if parties in gaol, and may try and give judgment ii. 35
Whether they, if an *act* limit an offenſe to be heard before juſtices of peace, have a juriſdiction ii. 36
Where an *act* ſpeaks only of juſtices in the county, they may hear and determine it ib
On trial of felons before them, if priſoner challenge twenty, ſo that there be not ſufficient remaining of the pannel, *tales* to be granted by precept returnable, as caſe requires; *contra*, on trial before juſtices of *gaol-delivery* ib
They may ſit out of a franchiſe, and determine miſdemeanors within the ſame ii. 38, 39
New commiſſioners may award execution on one reprieved ii. *Page* 405
But not fit to give judgment, or award execution on one reprieved by another judge without knowing reaſon of reprieve ii. 406
All precepts that iſſue at ſeſſions of *oyer* and *terminer*, as *venire fac. &c.* ought ſtrictly to be by precept, and under ſeals of the juſtices, but precepts by juſtices of *gaol-delivery* need not be otherwiſe than by award on the roll ii. 410
Special commiſſions of *oyer* and *terminer* may be limited to particular rivers, extending to ſeveral counties, but then every county muſt have a particular ſeſſion *pro tanto* ii. 21
In caſe of a commiſſion of *oyer* and *terminer*, or *gaol-delivery* to any city or town not a county, a general commiſſion for the county after notice or ſeſſion, by virtue thereof determined the ſpecial commiſſion; but this remedied by 2 & 3 *P. & M.* ii. 21, 25, 26
Special commiſſions of *oyer* and *terminer* may be for ſome ſpecial offenſes ii. 21, 27
To hear and not determine; where lawful, or not ii. 21
Of a commiſſion to determine and not inquire ib
But ſometimes, where indictment taken before juſtices of *oyer* and *terminer* in proper county, ſpecial commiſſion may iſſue to determine it in another county; but it muſt be tried by jury of proper county ii. 21, 22, 27
Vide Commiſſion, Court, Gaol-delivery, King's Bench, Trial.

Palace.

WHAT the extent of (it for trial of felonies within the ſame ii. 8, 9

For trial of ſuch felonies. Vide Court.

Pardon.

Capital puniſhments may be diſcharged by all parties intereſted; by appellant by releaſe, by *king* by his pardon *Page* 9
Tho a pardon reſtores not the blood, yet as to iſſues born after, it is a reſtitution 358
At common law a pardon of all *felonies (petit treaſon* being not excepted) extended to *petit treaſon*, and ſo now doth a pardon of *murder* 378
Where all *felonies* are pardoned by *act*, but murder is excepted whether a *murder*, which is *petit treaſon* be excepted 378. ii. 340, 342
In caſe of a mortal wound given, if *meſne* between ſtroke and death there comes a general pardon, whereby all miſdemeanors are pardoned, this pardons the felony conſequentially, and why 426
By 13 *R.* 2. pardon of *murder* muſt either be by expreſs word of *murder*, or elſe it muſt be a pardon of *felonica interfectio*, with a ſpecial *non obſtante* of 13 *R.* 2. 466, 467. ii. 45
Pardon of *manſlaughter* may be general by the words *felonia* or *felonica interfectio* only 467
If one indicted of *murder* obtains a pardon of *felony*, or *felonica interfectio*, and is afterwards arraigned on that indictment, he muſt plead *quoad murdrum, &c. not guilty*, and as to the *felony* and interfection his pardon ib
Antiently pardon of *all felonies* diſcharged ſome *treaſons* 498
Approver vanquiſhing appellee in battle ſhall have his pardon *tanquàm ex merito juſtitiæ* ii. 233
Whether *peine fort & dure* be pardoned by general words of *all contempts* ii. 252
King's pardon renders an infamous man a competent witneſs, for it takes away *pœnam & culpam in foro humano*; but his credit is to be left to the jury, yet not a lawful juryman ii. *Page* 278
Pardon of *all felonies* extends not to *piracy* ii. 370
How plea of pardon ſhall conclude, and how judgment ſhall be entered ii. 391, 392
In margin of roll in ſuch caſe is commonly entered *literæ patentes allocantur ſine die, &c.* ii. 391, 392

Parent and Child.

Command of parent excuſeth not child in treaſon or felony 44, 516
For homicide in parent defendendo *the child, and* è converſo. Vide Homicide, Murder, and Manſlaughter.

Park.

Park or warren muſt be either by charter or preſcription 491
Where homicide juſtifiable, or not, by ſtatute *de malefactoribus in parcis*. Vide Homicide, Murder, and Manſlaughter.

Parliament.

War ſucceeds beſt, when concerted with the parliament 159
Caution uſed in 28 *H.* 8. for pardon of the attempt to repeal 25 *H.* 8. unneceſſary, for parliament not reſtrained by a precedent *act* 280
Vide Impeachment, Treaſon.

Peace-Officers.

Are under more ſpecial protection than private men 481

Law makes every one an officer to take a felon flying or reſiſting *Page* 489
Conſtable bound to execute his warrant, and to purſue on *hue* and *cry*; if he doth not, he is indictable for a contempt 490
If peace-officers or aſſiſtants kill rioters reſiſting them, they are diſpuniſhable, either by common law or ſtatute 494 to 497
Where conſtable may command others to aſſiſt him; and if they refuſe, they are fineable 495, 588
In courts of *oyer* and *terminer*, &c. ſheriff and his ſubſtitutes are the ordinary miniſters in execution of criminals 501
Officer not ſuppoſed conuſant of the law, or to adviſe with counſel on all occaſions 578
Every one within vill to take notice of conſtable in the day; *contra* in the night without a ſpecial notification 461
Stocks the priſon of the conſtable 596
Authority of *conſtable*, *tithingman*, *headborough*, and *burſholder*, much the ſame ii. 96
Conſtable of a hundred a diſtinct officer, introduced by ſtat. of *Winton*, yet a conſervator of the peace ib
The ſeveral kinds of *watchmen* ib
Watch appointed by ſtatute of Winton, from what time to be kept; to be ſet by the conſtable; neglect thereof puniſhable; of the duty of ſuch watchmen ii. 96, 97
What the uſe of the watch kept by conſtable *ex officio*; regularly conſtable ought to be in company with them in their walk and watch ii. 97
What the power of *watch appointed by juſtices of peace* ib
Safer way to appoint them by order of ſeſſions, or *B. R.* ib
Watchman hath a double protection: as aſſiſtant to conſtable, when preſent, or in the watch, and as a watchman ſet by order of law ii. 97, 98
Law takes notice of his authority *ſub eo nomine*, and therefore killing him in execution of his office, murder ii. *Page* 98
He may arreſt night-walkers, and commit them till morning, and alſo felons and perſons ſuſpected of felony ib
Where killing them in execution of their office, *murder*, &c. Vide Homicide, Murder, and Manſlaughter.
Vide Arreſt per totum, Eſcape, Hue and Cry, Juſtice of Peace, Reſcue, Riot.

Peers.

A peer in *Ireland* tried *here* by a *Middleſex* jury for a treaſon *there* 155
In miſpriſion of treaſon or felony, or being acceſſary thereto, a peer tried by his peers, tho indicted by common grand inqueſt 374, 704
How *lord high ſteward* elected and commiſſionated for trial of peers, and of his office and duty 350
Of the court before *lord high ſteward* for trial of peers ii. 7
That ſubject amply treated of by lord *Coke* ib
Indictment of a peer good *ſans* addition ii. 177
In trial of peers no challenge allowed; for they are not only triers of fact, but in ſome reſpect judges ii. 275
Peer arraigned on indictment of felony before his peers, refuſing to plead ſhall have judgment of *peine fort & dure* ii. 319
Where proceſs of outlawry, or *cap. pro fine*, lies againſt a peer, or not ii. 177, 199, 200
What warrant iſſued by *lord high ſteward* for execution of a peer 501. ii. 409
What parts of execution for treaſon may be abated by *king*'s warrant under great or privy ſeal, &c. 370. ii. 412

For the clergy of peers. Vide Clergy.

Peine fort & dure. Vide Mute.

Petit Larciny. Vide Larciny.

Perjury.

If perjury be committed, that is within 5 *Eliz.* but indictment concludes not *contra formam ſtat.* yet it is good at common law, but not to bring party within the corporal puniſhment of the *act* ii. *Page* 191, 192

Petit Treaſon.

To what particulars 25 *E.* 3. reduces petit treaſon 377, 378
One having committed this offenſe may be indicted of murder 378
Servant kills maſter on a ſudden falling out, not petit treaſon, but manſlaughter ib
If wife or ſervant procure a ſtranger to kill the huſband or maſter, procurer only acceſſary to murder, and being only acceſſary, where the principal is only murder, cannot be petit treaſon; but if wife and ſervant conſpire death of huſband, and ſervant effect it in abſence of wife, it is petit treaſon in ſervant, and ſhe is acceſſary *before* to it, and ſhall be burnt 378, 379, 381, 382
If wife or ſervant, and a ſtranger conſpire to rob huſband or maſter, and ſervant or wife be preſent, and hold candle, while huſband or maſter is killed, ſtranger is guilty of murder, and wife and ſervant of petit treaſon as principal 379
Wife or ſervant intending to kill a ſtranger, by miſtake kills huſband or maſter, petit treaſon ib
If wife or ſervant conſpire with a ſtranger to kill huſband or maſter, if he or ſhe be in ſame houſe when fact done, tho not in ſame room, he or ſhe is principal in petit treaſon; if abſent, he or ſhe only acceſſary *before* to murder *Page* 379, 383
If wife or ſervant command one to beat huſband or maſter, and he beat him, whereof he dies, if wife or ſervant in ſame houſe, petit treaſon in wife or ſervant as principal, but murder in ſtranger 380
What will make a man guilty or principal in murder will make him ſuch in petit treaſon ib
Eadem lex for an inferior clergyman in relation to his killing his ſuperior ib
Who ſhall be ſaid a ſervant or maſter within 25 *E.* 3. with regard to this offenſe ib
This *act* ſhall not be extended by equity ib
Who is a wife within it, or not 381
Where it is petit treaſon for a clergyman to kill his prelate or metropolitan ib
Principals in petit treaſon, as well *before* as *after* 382
One arraigned of petit treaſon ſtanding mute, or challenging above thirty-five peremptorily, ſhall have judgment of *peine fort & dure* 382. ii. 399, 400
Whether excluſion of clergy from murder by 1 *E.* 6. ouſts it alſo in petit treaſon 340 to 343
Auterfoits acquit, or *attaint* of murder, a good bar to indictment of petit treaſon, and *è converſo* ii. 246, 252

Vide Clergy, Indictment, Judgment, Pardon.

Phyſician.

Phyſician or ſurgeon, tho not licenſed, gives a potion with a good intent, which kills the patient, no homicide 429, 430
Phyſicians and ſurgeons are to be licenſed according to 3 & 14 *H.* 8. 429

In what cafes ſtatute of 34 & 35 *H.* 8. diſpenſeth with the penalties of the former *acts* *Page* 429

Piracy.

How indictment to be to work a corruption of blood 355
Common law takes no notice of it under name of felony ii. 18, 370
1 *E.* 6. & 1 *M.* repealing all new felonies *tempore H.* 8. extend not to piracy 664
Pardon of all felonies reacheth it not ii. 370
Vide Admiralty, Clergy, Indictment.

Plague.

1 *Jac.* now diſcontinued 432
If one infected goes abroad with intent to infect another, who dies of it, whether it be murder ib

Pleas.

If one indicted of murder obtains a pardon of felony, or *felonica interfectio*, and is afterwards arraigned on that indictment, he muſt plead *quoad murdrum not guilty*, and as to the *felony and interfection* his pardon 467
If found guilty of murder, he ſhall have judgment; if not, his plea ſhall be allowed ii. 258
How plea of pardon concludes ii. 391
If owner of goods ſtolen ſuppoſed in indictment be a *feme covert*, or appear to have no intereſt or poſſeſſion in the goods, the party ſhall be acquit; but may be indicted *de novo* for the goods of huſband, or true proprietor 513
If *A.* be indicted as principal, and *B.* as acceſſary *before* or *after*, and both be acquit, yet *B.* may be indicted as principal, and former acquittal as acceſſary is no bar *Page* 625. ii. 244
But one indicted as principal and acquitted, ſhall not be indicted again as acceſſary *before*; and if he be, his former acquittal is a good bar, for it is in ſubſtance ſame offenſe; but antient law was otherwiſe 626. ii. 244
If he be indicted as principal or acceſſary *before*, and acquitted, he may yet be indicted as acceſſary *after*, they being offenſes of ſeveral natures ib
If there be an inquiſition of murder or manſlaughter, and an indictment for ſame offenſe, and party is acquitted on indictment, 'tis neceſſary to quaſh inquiſition, or arraign party upon it, who in ſuch caſe may plead *auterfoits acquit*, or *not guilty* ii. 65
In all caſes of *homicide by neceſſity*, which are no felony, where the matter is ſpecially preſented, as it may, party ſhall be preſently diſcharged, without being put to plead; but then this acquittal by preſentment is no final diſcharge, for he may be indicted and arraigned again afterwards, if matter of former indictment falſe; but *contra*, where indictment or coroner's inqueſt is of murder or manſlaughter, and thereon he is arraigned and tried, and this ſpecial matter proved in evidence, he ſhall be acquit thereon, and this acquittal is a perpetual bar againſt any other indictment for ſame death 491, 492. ii. 158, 246, 247, 303, 304
Same law in caſe of homicide *ſe defendendo*, or *per infortunium*, only petit jury ſhall find the ſpecial matter, and not acquit the party ii. 158, 246, 247
Where offenſe made felony, or otherwiſe penal by ſtatute, if by proviſo in ſame, or by any ſubſequent *act* ſome caſes are ex-

exempted out of it, indictment need not mention and qualify the offenſe, ſo as to exempt it out of the proviſo, but party ſhall have advantage of it on *not guilty*, and in ſame manner ſhall have the benefit of ſubſequent *act* to excuſe him by 21 *Jac.* ii. *Page* 170, 171

If year be miſtaken in indictment of felony or treaſon, and therefore offender be acquit, it is an erroneous acquittal, and yet ſhall be a good plea of *auterfoits acquit* ii. 179

If one indicted of murder *cujuſdam ignoti*, or aſſault *in quendam ignotum*, be acquitted or convicted, and afterwards indicted for aſſault or murder of ſuch a man by name, he may plead former conviction or acquittal, and aver it to be ſame perſon ii. 181

By ſtatute *auterfoits acquit* of principal or acceſſary, or *auterfoits attaint* of principal on indictment is no bar to an appeal; but *auterfoits acquit* on appeal remains a bar to indictment for ſame offenſe ii. 220, 250

Auterfoits acquit of robbery, rape, *&c.* on indictment a good bar to appeal of robbery, *&c.* ii. 250

In favour of appeal, if one be indicted of murder, and plead to it, and be convict, and wife enter appeal for ſame death againſt priſoner, pending appeal judgment ſhall be reſpited; but if wife be nonſuit judgment ſhall be entered on the conviction ii. 220

If one be both indicted and appealed before ſame juſtices of ſame murder, or other felony, and plead, party ſhall be arraigned on appeal firſt, and not on indictment; and if appellant be nonſuit on his appeal; priſoner ſhall be arraigned on appeal, and proceſs ſhall ceaſe on indictment; and if priſoner plead, or be acquitted, or plead *king*'s pardon, and it be allowed, regularly acquittal, or pardon and allowance thereof ſhall be entered on appeal, tho it be ſafe to enter it likewiſe on indictment; if there be no *ceſſet proceſſus* on indictment, and party be outlawed, he hath no remedy, but by writ of error on the outlawry, and he may aſſign for error his acquittal on appeal, and aver it to be ſame felony *Page* 221

If a *cap.* be awarded againſt a felon, and he render himſelf, and plead *not guilty*, and is let to bail, and then makes default, a *cap. ad audiendam juratam* ſhall iſſue, and if brought in, he ſhall be tried on his plea; but if he render himſelf on the *exigent*, and plead *not guilty*, and be let to bail till trial, and then make default, whereon an *exigent* is awarded, and felon is brought in on the *exigent*, [*quære* whether] he ſhall plead *de novo* ii. 224, 225

The ſeveral kinds of pleas on arraignment ii. 236

Of pleas declinatory ib

In all caſes of miſnomer party muſt plead over to felony ii. 238, 248, 255, 256

All foreign pleas to be tried by jury of county where party indicted, except in treaſon ii. 239

Regularly in all pleas, whether to the writ, or in bar, by matter of record or fact, or both, if plea doth not confeſs, as a plea of pardon to indictment, or of releaſe to an appeal, tho this plea be found againſt him by iſſue tried, or adjudged againſt him by the court, yet he ſhall not be convicted thereon, but plead over to the felony *not guilty*, as well in indictment as appeal ii. 239, 248, 255, 256

If one be indicted of felony, and plead a pardon, as if indictment be of murder, and he plead a pardon of felonies, or the like, he need not plead over to the felony,

felony, becauſe it ſuits not within his plea ii. *Page* 256
Yet if pardon on demurrer by *king*'s attorney, or an adviſement of court, be adjudged inſufficient, party ſhall be tried for the felony ii. 256, 257
The ſeveral kinds of pleas in bar ii. 240, 241
Of what kinds of matters plea of *auterfoits acquit*, &c. conſiſts ii. 241
Counſel ſhall be aſſigned to put plea in form ib
Priſoner muſt ſhew record of his acquittal, or vouch it in ſame court ii. 241, 242, 243
The like of attainder in caſe of *auterfoits attaint* ii. 241, 242
Regularly, if a record be pleaded in bar, and declared on in ſame court, other party ſhall not plead *nul iel record*, but have *over* of record; and if it be in another court, he ſhall plead *nul tiel record*, and day be given to procure record, or certificate thereof ii. 241, 242, 243
Priſoner may remove tenor of his record of acquittal into chancery by *certiorari*, and have it in *poigne*, or ſent to the juſtices by *mittimus ſub pede ſigilli* ii. 242
If one be arraigned in *B. R.* on indictment removed or found before them, who hath been formerly acquitted of ſame felony, either before juſtices of peace, or gaol-delivery, court will grant a *certiorari* to remove the record before them, and reſpite his plea, till he can remove his acquittal into the court, that ſo he may form his plea upon it, for record is part of his plea ii. 142
Plea muſt ſet forth record in certain; how it is to conclude ib
Record muſt be removed by writ, for tho *B. R.* may take an indictment, or other record of juſtices of peace *propriis manibus*, where it is to be proceeded on for the *king*, yet they cannot take record of acquittal to ſerve priſoner's plea without writ ii. *Page* 142
If one pleads *auterfoits acquit de meſme felony*, and vouch the record, court may examine proof, that it is ſame felony, and thereon allow it, without any confeſſion by *king*'s attorney; but what the ſafeſt methods ii. 242, 243
Plea allowed by teſtimony of juſtices of peace before whom he was acquit ii. 243
If priſoner be arraigned before juſtices of *gaol-delivery* in the country, and plead *auterfoits acquit* of ſame felony before ſame juſtices in that county, or other juſtices of ſame county that were before them, or in *B. R.* how plea to conclude ib
Of what averment matter of fact of the plea conſiſts ib
There muſt not only be acquittal by verdict, but a judgment thereon, *quòd eat indè ſine die*, and pleaded alſo ib
Acquittal regularly a warrant for entering of judgment at any time after ib
One may plead *auterfoits acquit* notwithſtanding variance in the times alledged in firſt and ſecond indictment, and aver it to be ſame felony ii. 244
If one be indicted for murder of *J. S.* and acquitted, and after indicted for murder of *J. N.* yet he may plead *auterfoits acquit*, and aver it to be the ſame man, & *que conus per l'un noſme & l'autre* ii. 244, 245
Where there is a different vill laid in the firſt and ſecond indictment, he may plead *auterfoits acquit*, and aver it to be ſame vill, but *contra*, where party indicted, firſt in one county, and then in another, but ſaid to be otherwiſe in an appeal ii. 245
If one commit a robbery in one county, and carry the goods into another, and is indicted of larciny in foreign county, and is

is there acquitted of the larciny, it is no bar to indictment of robbery in proper county, becauſe another offenſe . ii. *Page* 245

Neither is it a bar to indictment of larciny in proper county ib

Burglary committed, and goods ſtolen, if indicted of larciny for goods ſtolen and acquitted, yet he may be indicted for burglary, and *è converſo* ii. 245, 246

One acquitted for ſtealing the horſe, may be arraigned and convict for ſtealing the ſaddle, tho both done at ſame time ii. 246

Acquittal of murder a good plea to indictment of manſlaughter, or *è converſo*, ſo acquittal of murder a good bar to indictment of petit treaſon, and *è converſo* ii. 246, 252

It muſt be acquittal on trial either by verdict, or battle ib

Party acquitted by miſdirection of judge, may plead it ii. 247

Special verdict found in felony, and court erroneouſly adjudge it no felony, as long as that judgment remains unreverſt, if priſoner be indicted *de novo*; he may plead *auterfoits acquit* ii. 247, 248

If judgment reverſt, party may be indicted *de novo*; but *quære*, whether in point of the verdict party ſhall not be executed ii. 247

If at common law one had been ſuſpected of murder, and arraigned within the year and acquitted, tho arraignment ſhould not have been, yet it ſtood as a good acquittal pleadable to another indictment, or appeal ii. 247, 249

Auterfoits acquit no plea, where indictment inſufficient, or contains no felony ii. 247, 248

One muſt be *legitimo modo acquietatus* ii. 248

If error only in proceſs in appeal, or indictment, and yet priſoner appear and plead *not guilty*, and be acquit, this acquittal pleadable ii. *Page* 248

One attaint on inſufficient indictment ſhall not be arraigned on new indictment for ſame offenſe, unleſs former judgment firſt reverſt ib

Where a wrong perſon brings an appeal, *auterfoits acquit* is no plea, neither is it a bar to the *king*, but he may be indicted *nient obſtante* that acquittal; and if right heir bring a new appeal, and be nonſuit, he may be arraigned on that appeal at *king*'s ſuit ii. 249

If defendant be acquit on appeal of murder, or robbery by verdict, regularly a good bar to indictment ib

Acquittal by battle on an appeal no bar to indictment for ſame offenſe ib

Indictment and conviction of felony without judgment of death, or prayer of clergy, no bar of a new indictment, nor is *auterfoits acquit* by verdict, unleſs judgment given ii. 248, 251

Auterfoits convict and clergy had a good bar to indictment or appeal for ſame crime ii. 220, 250, 251

And ſo it is if he pray his clergy, and court adviſe upon it, tho clergy not actually allowed ii. 251, 390

Auterfoits attaint de meſme felony, tho on inſufficient indictment, was at common law a bar to appeals, as well as indictments of ſame offenſe, and ſo remains, except in appeals of death ii. 251

If *A.* be indicted of piracy, and hath judgment of *peine fort & dure*, and by a general pardon piracies are excepted, but judgment of *peine fort & dure* is pardoned by general words of all contempts, *quære*, whether, if he may be arraigned for ſame piracy, but he may be arraigned

of any other piracy committed before that award ii. *Page* 252
If *A.* be attaint of treaſon, *&c.* by outlawry, he ſhall not be indicted or appealed of ſame felony till outlawry reverſed ib
One indicted at common law of felony, and having judgment of death, yet may *nient obſtante* his attainder, be arraigned for treaſon committed before the felony; but *quære* as to treaſon committed after it ib
Where one is appealed of robberies committed on divers perſons and they bring ſeveral appeals, and he is attaint at ſuit of one, yet he ſhall be put to anſwer to appeals of the others ib
If there be an indictment and attainder at the proſecution of one, *quære*, whether after he may not be arraigned on an indictment at proſecution of another to have reſtitution on the ſtatute 545. ii. 252
One commits ſeveral felonies, and is attaint of one, and *king* pardons that attainder and the felony for which he was attaint, if after indicted or appealed for ſame felony, he may plead his attainder, and no good replication to ſay, he was pardoned after ii. 253
But yet may be indicted or appealed for the other felonies; and if he plead his former attainder, it may be replied that he was pardoned after, whereby he is reſtored to be a perſon able to anſwer thoſe offenſes ib
If one attaint commit a felony after, and be pardoned the firſt felony and attainder, he ſhall be put to anſwer the new felony ib
If one commit ſeveral felonies, and be convict of one, but no judgment of death, nor clergy given him, he may be indicted for all the former felonies ib
If one had been convict of any one felony, and prayed his clergy, and read, and had been delivered to the ordinary, formerly he ſhould never have been arraigned for any of the former felonies ii. *Page* 253
For any felony done after conviction, and clergy allowed, he may be indicted; but not if he ſtand attaint and unpardoned ib
Now by ſtatute clergy diſchargeth all offenſes precedent within clergy, but not ſuch other offenſes as are ouſted of it ii. 254
Acceſſary on arraignment may plead acquittal of principal ib
Gaoler arraigned for voluntary eſcape of a priſoner for felony may plead acquittal of felon of principal felony, and ſo may reſcuer arraigned on indictment for reſcue of a felon 611, 612. ii. 254
Felon acquitted of firſt felony ſhall not be arraigned of breach of priſon, or if indicted of it before acquittal, and then is acquitted of principal felony, he may plead it in bar to indictment for breach of priſon 611, 612. ii. 224, 254, 255
He who pleads *auterfoits acquit, convict or attaint* muſt plead it ſpecially ſetting forth record ii. 255
He muſt either ſhew record *ſub pede ſigilli*, or have record removed into court, where it is pleaded, by *certiorari*, or if it be record of ſame court, muſt vouch term, year and roll, for record is part of his plea ib
He muſt make averments, as caſe ſhall require, that he is ſame perſon, and it ſame offenſe ib
No iſſue ſhall be taken on plea of *nul tiel record*, becauſe pleaded in court, but *king*'s attorney may have *oyer* of record ib
The averments are iſſuable ib
If iſſue taken on them, they ſhall be tried by jury, that is returned to try priſoner, by 22 *H.* 8. ib
He that pleads theſe pleas, muſt plead over *not guilty* to the felony, for if the pleas be adjudged againſt

againſt him, yet he ſhall be tried on *not guilty* ii. *Page* 255, 256
Where one may plead to juriſdiction of court without anſwering to the felony ii. 256
If one by plea confeſs the fact, he need not anſwer to the felony, but he may in that caſe, if he will, plead over to the felony ib
If one be indicted or appealed of felony, and he will demur to the appeal or indictment, and it be adjudged againſt him, he ſhall be hanged, for it is a confeſſion of the indictment; he may take all exceptions to indictment or appeal, as might have been taken on demurrer, either before his plea, or in arreſt of judgment ii. 257
In caſe of demurrer no judgment of *peine fort & dure* can be given ib
Plea to the felony conſiſts of *not guilty*, (whereto clerk joins iſſue *cul. priſt.*) and the putting himſelf on his country ib
If either of theſe fail, it is in law ſtanding mute, either in treaſon or felony ii. 258
In treaſon or felony there can be no juſtification, as *ſe defendendo*, *&c.* ib
But on *not guilty* he ſhall have the advantage of all ſuch defenſes ib
If dureſs and compulſion from others, *&c.* will excuſe him, jury on the general iſſue ought to find accordingly ii. 258, 259
Where matter appears not to be felony, priſoner on *not guilty pleaded* may be acquitted ib. 303, 304
Where party is convict *within being burnt in the hand*, plea of *auterfoits acquit, and had his clergy*, as good a plea as before 18 *Eliz.* ii. 390
If priſoner plead a pardon, how it concludes, and what judgment entered ii. 391, 392
What concluſion of plea of *auterfoits acquit*, or *convict*, or *attaint de meſme felony*; moſt commonly priſoner pleads over *not guilty* ii. *Page* 238, 248, 255, 256, 392
How ſuch plea is confeſſed by *king's* attorney, or coroner ib
If one plead in bar to the indictment, yet if indictment inſufficient, whether *eat ſine die*, ſhall be applied to inſufficiency of indictment, or plea in bar ii. 393, 394
Reaſonable to have the *eat ſine die* ſpecial in that caſe, and how ii. 393
If entry of judgment of acquittal be *quòd eat indè quietus*, priſoner cannot be arraigned again, tho indictment inſufficient ii. 394, 395
One indicted of murder or manſlaughter, on *not guilty* the ſpecial matter is found, or jury acquits him, judgment is *quòd eat inde quietus*, it is a perpetual bar; ſo, if found guilty *ſe defendendo*, judgment is *quòd expectet gratiam regis* ii. 395
For pleas in abatement. Vide Abatement.

Vide Judgments.

Polygamy.

1 Jac. Bigamy, or [rather] Polygamy felony within clergy 692
Caſes excepted out of the *act* ib
Difference, where firſt wife married *beyond ſea*, and ſecond *here*, and *è converſo* 692, 693
A *feme* takes *baron* in *Holland*, and during his life marries another there, then true huſband dies, ſhe (ſecond living) marries a third *here*, *dehors* the *act* 693
But if, living firſt, ſhe had married third in *England*, felony within it ib
Where notice of party's being alive neceſſary, or not ib
What *beyond ſeas*, and what *within king's dominions*, *quoad* this *act* ib

Having

Having two wives, one of which is divorced *a menſâ & thoro* not within it; if divorced *cauſâ ſævitiæ*, whether within it *Page* 694
Where divorce *a vinculo matrimonii*, either party without proviſo in *act* may freely marry ib
If wife be divorced from the huſband *cauſâ adulterii vel ſævitiæ*, *vinculum matrimonii* not diſſolved; but *contra*, if divorced *cauſâ conſanguinitatis vel præcontractûs* 124, 381
Where divorce *à vinculo*, and one appeals marriage pending appeal, *dehors* the *act*; *contra*, if ſentence of divorce repealed 694
If either within age of conſent, ſecond marriage not within *act*; but *contra*, if *feme* of *twelve*, and man of *fourteen* ib
Trial directed to be where party taken; he may be indicted, where ſecond marriage was, tho never taken 694, 695, 705
Marriage to a former huſband, ſecond being alive, ſimply void 693

Pope. Vide Religion.

Præmunire.

1 *Mar.* repeals all *præmunires* enacted in or after 1 *H.* 8. 308

Vide Religion.

Prerogative. Vide King.

Preſcription.

Why *deodands*, goods of felons of themſelves, felons and outlaws cannot be claimed by preſcription 419

Preſentment.

A more comprehenſive term than indictment ii. 152, 153
Some preſentments of themſelves convictions and not traverſable, others not ſo, but in nature of informations, and therefore traverſable ii. *Page* 153, 154, 155
Preſentment of a *felo de ſe* before juſtices of peace, or *over* and *terminer*, traverſable by the executor ii. 154
Why coroner's inqueſt of a *fugam fecit* is concluſive, and not that of grand inqueſt, or petit jury ib
If party be preſented to have ſuffered an eſcape, becauſe at leaſt he is to be fined, he ſhall have his traverſe to it ib
But if eſcape be preſented upon a vill, it is not traverſable, and why 603. ii. 154
Indictment againſt city of *London* for an eſcape traverſable ii. 154, 155
A preſentment of a riot, or forceable detainer by a juſtice, or two juſtices of peace is a conviction by *ſtat.* ii. 155
Preſentment of juſtices of peace of default in repairs of an highway, traverſable ib
Inqueſts muſt be returned to be *probi & legales homines de comitatu prædicto* ii. 167
For preſentments before coroner.
Vide Coroner.
Vide Inqueſt of Office.

Prieſt. Vide Clergy, Felony by Statute, Religion.

Principal and Acceſſary.

Who ſhall be ſaid principals in felony in the firſt and ſecond degree 233, 437, 615
Acceſſaries *before* and *after* deſcribed 233, 613, 615, 618
In treaſon no acceſſaries but all principals, ſo procurer *before*, or a knowing receiver *after*; but whether a knowing receiver of a counterfeiter of the great, or privy ſeal, or the coin be a principal in treaſon 234, 237, 613

Whether

Whether receipt of a felon after attainder in same county makes an accessary *without notice* *Page* 323, 622
Consenting to a felony makes a man principal or accessary, bare concealing, only misprision 374
If servant or wife be of confederacy to kill the husband or master, and be in same house where he is killed, tho not in same room, they are principals, and guilty of petit treason, for it is a presence; and so in other cases 379, 439
There are principals and accessaries both *before* and *after* in petit treason 381
If one take poison by persuasion, but in absence of another, and die of it, persuader is principal in murder 431
Counselling, commanding, or directing killing a man, if he that counsels, *&c.* be absent, makes him accessary *before* to the murder 435
In case of poisoning, he that counsels another to give poison, if he doth it, he, who counsels it, if absent, but accessary *before* 435, 615
He, who lays, or gives poison, tho absent when taken, is a principal ib
If *A.* command *B.* to beat *C.* and he beat him to death, murder in *B.* and if *A.* be present, murder in him also; if absent, he is accessary ib
If *A.* counsels *B.* to poison his wife, *B.* obtains poison from *A.* and gives it his wife, who ignorantly gives it to a child, this is murder in *B.* but *A.* who was absent, is not accessary to the murder, because the command shall be construed strictly 436
If *A.* counsel *B.* to beat *C.* with a small wand, if *B.* beat him to death with a great club, *A.* is not accessary ib
If *A.* counsel *B.* to kill *C.* and before the fact done countermands it, if *B.* does it afterwards, it is murder in *B.* but *A.* not accessary *Page* 436, 452
In manslaughter there can be no accessaries *before*, nor in homicide *se defendendo* 437, 450
If *A.* be indicted of murder, and *B.* as accessary *before* by procurement, and *A.* be found guilty only of manslaughter, *B.* shall be discharged ib
All present and assisting to murder, principals ib
In *burglary* or robbery, those who watch at lane's end, *&c.* tho not actually present, burglars, or robbers 439, 534, 537, 555, 563
Otherwise on 39 *Eliz.* that *act* binds up exclusion of clergy to stealing in the house 537
Persons ready to aid, tho but lookers on, principals ib
Divers come with one assent to do mischief, as to kill, rob, beat, *&c.* and in execution thereof one commits murder, all principals 440, 441
Divers aiming to rob a person charge him with felony, one robs him, robbery in all; but without such intent, rest not guilty ib
If *A.* comes in company with *B.* to beat *C.* and *B.* beat him so that he dies, *A.* is principal ib
Several rioters in a house, some issue out and murder one within view, who came to constable's assistance, all within the house who abetted the assault, principals 463
1 *Jac.* ousts none of clergy but him who stabs, not even persons present and assisting 468
Where principal agent shall be excused from felony, and principal in second degree be guilty 514
All that come in company to rob, principals, tho one only do it 533
Where one may be principal in robbery, tho neither actually present at the assault, nor robbery,

bery, nor aſſenting thereto *Page* 534, 537, 538,
In *acts* making felony acceſſaries *before* and *after* implied 613, 614, 615, 632, 644, 704
Whether *act* making offenſe felony in offenders, their counſellors, procurers and abettors, and being ſilent as to acceſſaries *after*, extends not to acceſſaries *after* 704
In treaſon, whether principal in firſt degree ſhall be tried before thoſe in ſecond degree 613. ii. 223
In caſes criminal, not capital, no acceſſaries 530, 613, 616, 618
Acceſſaries *after* to crimes not capital by receiving offenders cannot be in law under any penalties as acceſſaries, unleſs the *acts* inducing the penalties extend to receivers, or comforters, as ſome do 613
Maintainers in certain *acts* denote maintainers of offenſe, and not parties ib
Where an *act* makes a felony, it incidently makes ſuch acceſſaries as would be acceſſaries *before* or *after* to a felony at common law, but the ſpecial penning ſometimes varies the caſe 613, 614, 615, 632
But if the *act* expreſs acceſſaries *before* and not *after*, there can be no acceſſaries *after* 614
Acceſſaries *after* an offenſe of a lower degree than acceſſaries *before* 614, 615
Procurers, *counſellors* and *abettors* import acceſſaries *before* 614
Receivers or *comforters* acceſſaries *after* ib
In offenſes unpremeditated no acceſſaries *before*, as *per infortunium*, &c. 615, 616
Words of bare permiſſion make not an acceſſary 616
All preſent, when poiſon infuſed, principals; but hiring another to do it, without being preſent, makes him only acceſſary ib
Buying materials of poiſon makes party only acceſſary *Page* 616
Where the execution varies from the command in perſon ſlain, or in nature of offenſe, commander is not acceſſary; *contra*, where offenſe is only varied in degree 617
A. gets *B.* with child, and before the birth counſels *B.* to kill it, child is born, *B.* murders it, *A.* acceſſary ib
Where the inſtrument, as a madman, or wild beaſt cannot be a principal, party, tho abſent, is principal ib
A. commands *B.* to kill *C.* and before the fact repents and countermands it, yet *B.* kills him, *A.* not acceſſary; *contra*, if he had not countermanded it 618
A. knows *B.* hath committed a felony, but conceals it, not felony, but miſpriſion ib
A. ſees *B.* commit a felony, but conſents not, nor takes care to apprehend him, not acceſſary, but finable ib
A. knowingly ſuffers a felon in his houſe to eſcape before arreſt, not acceſſary; but *contra*, if corrupted by money 619
So if he ſhut fore-door, and deceive purſuers, this being an *act*, and not bare omiſſion, he is acceſſary ib
A. hath his goods ſtolen by *B.* if *A.* receives his goods without any contract to favour him, it is lawful; but otherwiſe theft-bote, but yet *A.* not acceſſary ib
Where receipt of ſtolen goods [before 3 & 4 *W.* & *M.* &c.] made an acceſſary, or not 619, 620. ii. 150
Relieving a traitor or felon in priſon or bailed out, makes not an acceſſary 620, 621
Conveying inſtruments to a felon to break priſon, or bribing gaoler to ſuffer an eſcape makes an acceſſary 621

Writing in favour of a felon for his deliverance, or inſtructing him to read to ſave him by his clergy makes not party an acceſſary *Page* 621

If *A.* be committed for felony, and *B.* an attorney, adviſe the friends of *A.* to write to the witneſſes not to appear againſt him, who writes accordingly, this makes neither *B.* nor the friends acceſſary, but puniſhable, and how ib

A huſband receiving the wife may be an acceſſary, but not wife for receiving the huſband ib

If the wife alone, without his privity, receive a felon, ſhe only acceſſary ib

If they jointly receive a felon, it is only the act of the huſband ib

Acceſſary cannot be, unleſs felony committed; *A.* wounds *B.* dangerouſly, *C.* receives *A.* then dies, *C.* not acceſſary 622

One may be acceſſary to an acceſſary by receiving him, knowing him to be an acceſſary to felony ib

No acceſſary in receipt of a felon, without knowing that the party hath committed a felony ib

Acceſſary may be indicted with principal, or ſeverally 623. ii. 223

An acceſſary *before* or *after* in another county, than were principal felony committed, diſpuniſhable at common law ib

By 2 & 3 *E.* 6. acceſſary indictable in county where acceſſary, and to be tried there; this act gives no power to juſtices of peace 623. ii. 44

Juſtices before whom foreign acceſſary is, ſhall write to thoſe before whom principal is attaint, for record of attainder, and how the writ is to be 623

Proceſs of outlawry muſt ſtay againſt acceſſary till principal attaint 623. ii. 200

Acceſſary ſhall not anſwer till principal be tried, but otherwiſe, if he will wave benefit of the law *Page* 623. ii. 200

But if he wave it, neceſſary to reſpite judgment till principal be convict and attaint, for if principal be after acquit, conviction of acceſſary annulled; but if acquit of the acceſſary, acquittal good 624. ii. 224

If he be indicted as acceſſary to three, he ſhall not be arraigned till all the principals be attaint or outlawed; but if he be indicted as acceſſary to one of them only, if that one be attaint, tho the others be not, he ſhall be arraigned 624. ii. 200, 201

But the court may, if he be indicted as acceſſary to three, arraign him only as acceſſary to the party attaint, and if acquit of that, he may be arraigned *de novo* as acceſſary to the other two 624. ii. 200, 201

Beſt to reſpite arraignment of acceſſary till all principals appear, or be outlawed ib

If principal and acceſſary appear, and plead together, they may be tried by ſame inqueſt; but principal muſt be firſt convict and attaint, and how jury to be charged 624. ii. 223

If principal plead in bar, or abatement, acceſſary not to anſwer till plea determined; if plea maintained, acceſſary diſcharged, if over ruled, principal ſhall plead over to felony, and may be acquitted ib

If *A.* be attaint of murder on an appeal, and then *A.* is indicted of murder as principal, and *B.* as acceſſary, principal pleads former attainder, *B.* ſhall not be put to anſwer as acceſſary, becauſe he is not attaint upon ſame ſuit; and ſo it is, if attainder of *A.* were firſt on the appeal 625

If principal was acquit, or convict, and had his clergy, a pardon, &c. acceſſary ſhould not [before 1 *Annæ*] have been arraigned; *contra*,

contra, if after attainder *Page* 598. 625
If principal be erroneously attaint, acceſſary ſhall be arraigned, but principal reverſing his attainder, reverſeth alſo attainder of acceſſary 625
One acquit as principal cannot be indicted as acceſſary *before*, but acquit as acceſſary *before* or *after* may be arraigned as principal 625, 626. ii. 244
But one acquit as principal or acceſſary *before* may be indicted as acceſſary *after* 626. ii. 244
Acceſſary to crimes within 28 *H.* 8. *of trial of treaſons*, &c. *upon the high ſea*, not puniſhable thereby, but by the *marine law*. ii. 17, 18
Principal in murder in ſecond degree, may be arraigned and tried before principal in firſt degree 437. ii. 223
Lately acceſſary, if he appear, hath been arraigned and put to plead, but proceſs againſt inqueſt and trial ceaſeth, till principal come in, or be attaint by outlawry ii. 224
Acceſſary may pray proceſs againſt principal, and therefore, if acceſſary acquitted before principal tried, it is a good acquittal; and if convict, a good conviction; but no judgment ſhall be given on conviction, till principal tried ib
If *A.* be arreſted, or in priſon for felony, and *B.* reſcue him, or the gaoler ſuffer a voluntary eſcape, tho they may be preſently indicted; yet they ſhall not be arraigned till *A.* be convict, or attaint by judgment, or outlawed; for if *A.* be acquitted on the indictment, the reſcuer, or gaoler ſhall be diſcharged 237, 238, 591, 598. ii. 224
How far a wife may be acceſſary to her huſband's treaſon, or felony. Vide Coverture.

Priſon. Vide Arreſt, Breach of Priſon, Commitment, Eſcape, Gaol, &c.

Privilege. Vide Habeas Corpus.

Procedendo. Vide Certiorari.

Proceſs.

Regularly no proceſs iſſues in *king's* name to take a felon, unleſs on indictment, or matter of record in court *Page* 575, 576. ii. 113
Of the writ *de ſecuritate pacis* 51, 52
In all caſes *king's* writs directed to ſheriff, which he executes *per ſe*; or by his warrant to his bailiffs 577
Sheriffs or bailiffs may require any one to aſſiſt in the execution ib
If above two coroners in a county, and a writ is directed *coronatoribus*, tho one dies, whilſt plural number remains, a return by the coroners is good; but if only one ſurvivor, he cannot execute and return it till another made ii. 56
But if two coroners in a county, or more, one may execute the writ, as in caſe of an *exigent*, but return muſt be in name of *coronatores* ib
Coroner on appeal in his county may iſſue proceſs to take appellee ii. 68
But if only a coroner of a franchiſe, whether he may make precept to ſheriff to attach him ib
He cannot make precept to bailiff of a franchiſe, becauſe bailiff of a franchiſe cannot execute proceſs within it but by ſheriff's mandate ib
Proceſs after indictment iſſued from a ſeſſions of the peace is always in *king's* name ii. 113

On indictment or information preferred on a penal law, *capias* not firſt proceſs, but *venire fac.* and *diſtringas*, and in caſes of information no proceſs of outlawry at all till 21 *Jac.* ii. *Page* 113
Superſedeas on a prohibition iſſues from *chancery* in vacation, from *B. R.* in term ii. 147
Of the writ *de odio & atid*; its different names ii. 148
Why diſuſed ib
Party to be bailed by twelve perſons ib
Tho indictments be not diſcontinued by demiſe of the *king*; in ſome caſes proceſs are ii. 189, 209
In indictments of treſpaſs *venire fac.* firſt proceſs, and when *non eſt inventus* is returned, *cap.* and *exigent* ii. 194
All proceſs on an indictment, and generally all proceſs for the *king* are with a *non omittas*, &c. 577. ii. 224
By virtue thereof ſheriff may enter into any liberty to execute the ſame ii. 224
If party be in his own houſe, or in the houſe of another, and doors be ſhut, and ſheriff having given notice of his proceſs demand admittance, and the doors be not opened, he may break open the doors, and enter to take the offender ib
For jury proceſs. Vide **Trial.**
For proceſs in outlawry. Vide **Outlawry.**
For warrants. Vide **Arreſt, Juſtices of Peace.**
Vide **Certiorari, Habeas Corpus.**

Property.

One hath a property *ratione loci privilegii & impotentiæ*, in young beaſts and birds *feræ naturæ* in his park 511
A lodger hath a ſpecial property in his chamber 554
Artificial acceſſions by *adjunction, commixtion*, and *ſpecification* *Page* 513
Vide **Burglary, Indictment, Larciny, &c.**

Purveyors. Vide **Felony by Statute.**

Queen.

A QUEEN regent, who is married, holds her ſovereignty as intirely as if ſhe were ſole 108
Who ſhall be ſaid a queen within 35 *E.* 3 de proditionibus. Vide **Treaſon.**

Rape.

FELONY at common law, then by ſtatute made by miſdemeanor, and by 13 *E.* 1. felony again 627, 632
How antiently puniſhed; but it was in the woman's power to ſave raviſher by marriage 627
Not inquirable in a *Leet* or *Turn* 627, 632. ii. 69
Rape defined 628
Carnal knowledge of a girl under ten, felony without clergy, by 18 *Eliz.* 630
If above ten, and under twelve (*deins age* of conſent to marriage) tho ſhe conſent, it is a rape 631
Debet eſſe penetratio, as well as *emiſſio* 628
Leaſt penetration *abſque emiſſione* makes it a rape ib
An aider a raviſher ib
Keeping a woman as concubine before the rape, antiently a good exception, and now may be evidence of aſſent ib
Huſband cannot commit it on his wife 629
But aiding another to commit it upon her, indictable as a rape, tho wife cannot have appeal of it againſt her huſband ib

Wife in ſuch a caſe may be a witneſs againſt her huſband *Page* 629
Infant under fourteen preſumed *incapax*, tho he may be principal in aiding, *&c.* 630
Conſent on menace of death excuſeth not 631
Mulier vi oppreſſa concipere poteſt ib
Subſequent conſent not extorted creates a bar of her appeal, but raviſher indictable 632
In ſuch caſe who ſhall have the appeal 631, 632
What forfeitures the raviſher and raviſhed aſſenting incur by ſtatute 631
There may be acceſſaries *before* and *after* 632
Freſh diſcovery and purſuit neceſſary on part of raviſhed 632, 633
Year and day not allowed for bringing appeal, but it is in diſcretion of court 633
Principals ouſted of clergy, but not acceſſaries *before* or *after* ib
What neceſſary concurring evidence to confirm that of the raviſhed 633, 634, 635
Where an infant raviſhed ſhall be heard without oath 634, 635
Accuſation of a rape eaſily made, hard to be proved, and harder to be defended by the accuſed, tho never ſo innocent, and many inſtances thereof 635, 636. ii. 290

Realm.

Realm of *England* comprehends the narrow ſeas, *invading king's* ſhips in the ſame, *levying war en ſon realm* within 25 *E.* 3. 154
Ireland, tho part of dominions of this crown, yet no part of the realm of *England*, nor *infra quatuor Maria* 155
The like [formerly] of *Scotland*, even while it was under the power of the crown of *England*, as in ſometimes of *E.* 1. and *E.* 3. ib
Iſles of *Man*, *Jerſey*, *Guernſey*, *&c.* tho parcel of dominions of this crown, for what purpoſe they are not within the realm *Page* 156
For trial of foreign treaſons, and of an offenſe made felony by ſtatute, conſiſting partly in the realm, partly out. Vide County.
What ſhall be ſaid beyond ſeas, and what within king's dominions with reſpect to 1 Jac. *of bigamy.* Vide Polygamy.

Vide Ireland.

Receiver.

Whether receipt of a felon after attainder in ſame county, makes an acceſſary *ſans* notice 323, 622

Vide Forcible Marriage, Principal and Acceſſary, &c.

Recognizance. Vide Bail, Juſtice of Peace.

Record.

A judge fined for raiſing a record 646
On *Weſtm.* 1. an attorney, impriſoned for a year and a day, and baniſhed the court *C. B.* for embezzling part of a record 647
If a clerk had made a miſentry of record, the judge of the court might *ore tenus* have rectified it, tho ſometime after ib
A judge of record is *quaſi* a living record, and controuls the entry of the clerk ib
King's title being of record muſt be avoided by record ii. 205
Judgment of record to be avoided by record ii. 207
Acquittal generally a warrant for entry of the judgment at any time after ii. 243
By 8 *H.* 6. *ſtealing, carrying away, or avoiding records*, felony, clergy allowed 645, 646, 653

Felony in principals and acceſſaries *before* *Page* 645, 646
Expoſition on this *act* 645 to 653
Puniſhment of this offenſe before the *act* 646 to 649
If judgment thereby be reverſible, tho not reverſed, it is within the *act* 650
What records are within it 649, 650
No difference, whether judgment be in a criminal or civil caſe, or whether reverſible by *error* or *plea* 650
If it be in affirmance of judgment, puniſhable as a miſdemeanor, but not felony 650, 651
But if *A.* be ſued by *original* to *exigent* and outlawed, and afterwards *exigent* is made *B.* by one man, and original the ſame by another, felony in him who raſed *original*, and in him alſo who raſed *exigent* 651
If this offenſe ariſe in two counties, diſpuniſhable as felony, but puniſhable as miſpriſion in either 651, 652, 653
Juſtices of either bench enabled to hear and determine it, and *C. B.* has conuſance, tho offenſe in record of *B. R.* 651
Trial to be by party-jury of clerks and others ib
C. B. may take indictments thereof ib
Indictment may be taken by clerks alone, or foreigners alone, or both; but trial to be by party-jury only ib
In what county to be tried 652
Where by ſpecial commiſſion ib
Where indictment removable in *B. R.* ib
If offenſe committed in *London*, mayor not to be named in commiſſion ib
1 Jac. *acknowledging fine, recovery, deed inrolled, ſtatute or recognizance, bail or judgment in name of another not privy to ſame, felony*, clergy ouſted, but no corruption of blood, or loſs of dower 696
Bail taken, but not filed, not within this *act*, [but ſince made felony] *Page* 696
How record of acquittal or conviction ſhall be pleaded, ſhewn forth, or certified upon plea of auterfoits acquit, &c. *and where* nul tiel record *pleadable, or not.* Vide Plea.

Vide Amendment, Chancery, Certiorari.

Recuſant. Vide Religion.

Relation. Vide Felo de ſe, Forfeiture, &c.

Religion.

Hereſy in common ſpeech comprehended *apoſtacy*, *witchcraft*, and *formal hereſy* 383
Apoſtacy defined ib
What the puniſhment of it by the old laws *here*, and by the imperial laws ib
Soliciting others to *apoſtacy* moſt penal ib
Witchcraft antiently puniſhed by writ *de hæretico comburendo* ib
Hereſy variouſly defined 383, 384
The definition of the papal canoniſts makes the ſmalleſt deviation from them *hereſy* ib
Who the judge of *hereſy* according to the common and imperial law 384, 385
The ſolemnity that accompanied the degredation of one in orders 384, 385, 389
Inquiſitors thereunto deputed by the pope, or ordinary 384, 385
Heretics diſtinguiſhed into ſeveral ranks 385
A ſimple heretic defined ib
Diſmiſſed on abjuring ſpecially the particular opinion, or generally all heretical opinions ib
The latter abjuration required of thoſe, that were *graviter ſuſpecti* 385, 386

Who

Who ſhall be ſaid *hæreticus contumax* *Page* 386
Who a *relapſed heretic* ib
If after conviction heretic abjured his opinion, his life was ſaved; but if he relapſed after abjuration, then delivered over to ſecular power; no ſuſpenſion of ſentence 386, 387
By civil and canon law convicting and ſentencing heretics were left to the eccleſiaſtical judge, without which civil juriſdiction could not puniſh 387
Several penalties conſequential on ſentence of *hereſy* ib
Whence burning all heretics indiſtinctly, if pertinacious or relapſed, took its riſe 388
Penalties by canon law go no further than eccleſiaſtical cenſures, and what theſe are ib
Secular power made the miniſter in execution of heretics 389
Princes were not ſuffered to ſhew any courteſy to heretics ib
When ſentence given by the ordinary, he was delivered over to the lay officer, and then a mandate iſſued from chief magiſtrate to execute offender ib
Reflections on the miſerable ſervitude of chriſtians under the papal hierarchy 389, 390
How the law and uſage obtained here touching heretics before *R.* 2. 390 to 396
Fitzherbert miſtaken in ſaying, that the writ *de hæretico comburendo* iſſued only in caſe of a relapſe 394
Death rarely inflicted on heretics before *R.* 2. ib
Quo jure goods forfeit for hereſy before 2 *H.* 5. ib
Of *hereſy* in the times of *R.* 2. *H.* 4. *H.* 5. and ſo to 25 *H.* 8. 395 to 402
The power of the dioceſan touching *hereſy* by 2 *H.* 4. and an expoſition thereon 395 to 400, 409, 410
Temporal judge might incidently have taken notice, whether a *tenet* was hereſy or not, and tho dioceſan had ſo certified, temporal judge might have delivered party impriſoned on *habeas corpus*, and falſe impriſonment lay againſt party detaining him *Page* 400, 407, 408
Expoſition on 2 *H.* 7. againſt *heretics* and *Lollards* 401
What the method of proceeding, and how the law touching heretics and their puniſhment ſtood from 25 *H.* 8. until *firſt of Eliz.* and from that time to the time the author wrote 401 to 411
1 *Eliz.* defines hereſy 408, 409
Expoſition on that *act* 404 to 411
It ſet firſt boundary to hereſy 406
Significavit of conviction ought to have contained (even at common law) the particular hereſy, without it no writ *de hæretico comburendo* ought to have iſſued 407, 408
Whether conviction of heretics was practiſed in queen *Elizabeth*'s time 405
9 *Jac.* two men convict of *Arianiſm* before the dioceſan burnt by writ *de hæretico comburendo* ib
[*This writ is taken away by* 29 Car. 2. *hereſy how puniſhable at this time*, vide in notis] 410
Great privileges granted to the clergy by antient kings and ſtates ii. 323, 324
In ſome kingdoms double ſupreme power; *regnum eccleſiaſticum & ſeculare*; former only dependent on the pope, the latter ſubordinate to the former, ſo *regnum ſub graviori regno* ii. 324
The original of ſanctuary, and original and progreſs of *privilegium clericale* ii. 323 to 330
The clergy claimed their privileges *jure divino* ii. 323, 324
Sanctuary ouſted by ſtatute 605
Supremacy of *king* in matters eccleſiaſtical, a moſt unqueſtionable right of the crown 75
Of the papal encroachments thereon, and alſo on his ſovereignty in matters civil under pretence

of *in ordine ad ſpiritualia* *Page* 76
Bringing in pope's bulls againſt common law, and ſometimes antiently puniſhed as treaſon 643
Felony by 13 *R.* 2. ib
By 13 *Eliz.* the offenſe *as well in the bringers in of theſe bulls*, &c. *as executors thereof*, treaſon as well in eccleſiaſtics as laymen ib
By 35 *Eliz.* penalty of *diſſuading from church, holding of conventicles* 688, 689, 690
Non-conformity within three months after conviction, party ſhall abjure the realm ib
Not departing, or returning, felony without clergy ib
Submitting diſcharged of the penalty of this *act* ib
Relapſing loſeth benefit of the ſubmiſſion ib
Penalty *for retaining or relieving recuſant after notice* ib
Expoſition on this *act* ib
Circumſtances neceſſary to be alledged and proved ib
By 35 Eliz. *popiſh recuſant refuſing to abjure, or after abjuration to depart* felony without clergy 690
Not to remove five miles from *London* ib
By 1 *Eliz.* againſt *maintaining any foreign eccleſiaſtical authority within theſe realms*, firſt offenſe forfeiture of goods, &c. ſecond incurs penalty of *præmunire*, third treaſon 329, 330
Expoſition on this *act* 330
By 5 Eliz. *maintaining the authority of the pope made a præmunire* the firſt time ib
So *refuſing to take the oath of ſupremacy* 331
Second offenſe in both caſes, treaſon ib
Expoſition on this act 331, 332
By 23 Eliz. *reconciling or being reconciled to the popiſh religion*, where made treaſon; how inlarged by 3 *&c.* 333, 337, 338
Expoſition on both theſe *acts* ib
What the religion eſtabliſhed within 23 *Eliz.* 333
Aiders and maintainers of offenders within 23 *Eliz.* and concealers of ſuch offenſes, how puniſhed *Page* 333
By 27 *Eliz.* where a *ſubject, not being a jeſuit, educated in a foreign ſeminary, and not returning after proclamation, or a popiſh prieſt coming into the realm* ſhall be guilty of treaſon 336
Receiving of ſuch popiſh prieſt knowingly, felony *ſans* clergy 336, 615, 688
Sending relief to a ſeminary, a *præmunire* 336
Concealers of ſuch prieſts, how puniſhed 337
Juſtice of peace, to whom diſcovery made, not informing one of the privy council, &c. ſhall forfeit 200 marks ib
25 Eliz. *a ſuſpected jeſuit or prieſt, refuſing to anſwer directly*, to be impriſoned, till he ſhall make direct anſwer ib

Vide Clergy, Miſpriſion.

Reprieve.

Vide Execution and Reprieve.

Reſcue.

Reſcue of one taken on general warrant to anſwer what ſhall be objected, no cauſe being expreſt, not felony 578, 609
He who reſcues a felon, may be indicted, but ſhall not be arraigned till principal be convict or attaint 598, 607. ii. 254
Reſcuer is *quaſi* acceſſary, if principal be convict and not attaint, but hath his clergy, or be acquitted, reſcuer ſhall not be put to anſwer the reſcue, but be diſcharged ii. 254
If principal be found *not guilty*, or guilty of a crime not capital, reſcuer ought to be diſcharged, but he may be fined for the reſcue 599. ii. 254

Tho priſoner indicted of ſeveral felonies, yet the reſcue makes but one *Page* 599
A man arreſted on *meſne* proceſs in carrying to gaol is reſcued, the return of the reſcue excuſeth the ſheriff; *contra* of an execution 601, 602
If a felon be attaint and carried to execution, and be reſcued from the ſheriff, ſheriff is puniſhable, becauſe he ſhould have taken ſufficient power with him 602
Hinderance of arreſt of felon miſdemeanor, but no felony 606
Where arreſt of a felon lawful, reſcue of him, felony ib
If in cuſtody of a private man, notice that he is arreſted for felony neceſſary to make it felony; *contra*, if in cuſtody of an officer ib
Return of reſcue of a felon againſt *A.* by ſheriff not ſufficient to put him to anſwer to it without indictment ib
If priſoner under cuſtody be reſcued or priſon broke by ſtrangers without his procurement, no felony in the priſoner, but felony in the ſtrangers as a reſcue; but if by his procurement, felony in him as a breach of priſon ib
If party reſcued be impriſoned for felony, and be reſcued before indictment, what indictment muſt ſurmiſe; but if party be indicted and taken by a *cap.* and reſcued, then there need only a recital that he was indicted *prout*, and taken and reſcued 607

Vide Breach of Priſon, Eſcape, Treaſon.

Reſtitution.

The ſeveral means of reſtitution of goods to party, from whom ſtolen 538
On appeal of robbery, *&c.* and conviction thereon, goods contained in appeal were to be reſtored to appellant *Page* 538, 539
If he omit any in his appeal, they are confiſcate 538, 545
If party brings appeal of robbery, *&c.* and it appears appellee came to the goods by bailment, *&c.* without felony, plaintiff forfeits his goods to the *king* for his falſe appeal 539
Where one ſteals goods of divers men ſeverally, and one of them convicts offender on his appeal, before judgment reſt may purſue their appeals ib
If judgment be given againſt *A.* on the appeal of *B.* yet if appeal of *C.* were begun before the attainder, *A.* ſhall be arraigned on appeal of *C.* becauſe he is to have reſtitution of his goods thereby; ſecond trial at ſuit of *C.* only in nature of an inqueſt of office to intitle him to reſtitution; whether the attainder be a bar to *C.* ib
But if *C.* doth not commence his appeal before *A.* is attaint, *A.* ſhall not be arraigned thereon; but if afterwards pardoned, he ſhall be arraigned at ſuit of *C.* but *contra*, if attainder were at *king*'s ſuit ib
Where appellant ſhall have reſtitution 540
When he ſhall have reſtitution 540, 541
Of what things he ſhall have reſtitution 541
If felon waive goods ſtolen without any purſuit after him, they are not in law *bona waviatia*, nor forfeit; but *contra*, if he waive them on purſuit ib
This forfeiture not like a ſtray, where tho lord may ſeize, yet owner may retake it within year and day; but here true owner cannot ſeize his own goods, tho on freſh ſuit within year and day. which is an expedient in the law to compel owner to proſecute his appeal ib

Of

Of what things owner ſhall have reſtitution on 21 *H.* 8. he ſhould have had reſtitution of on conviction in appeal at common law *Page* 541
Before this *act* no reſtitution on indictment 542
This *act* ſpeaking of *king*'s ſubjects extends to aliens robbed ib
If ſervant be robbed of maſter's money, and maſter or ſervant by procurement give evidence, and convict felon, maſter ſhall have a writ of reſtitution ib
Reſtitution to be to party robbed, or owner ib
If *A.* be robbed by *B.* and *C.* and *B.* only is convict of robbery by evidence of *A.* he ſhall have reſtitution ib
If *A.* be robbed of an ox by *B.* who ſells him to *C.* who keeps the money in his hands, and after kills the ox and ſells it, or if the money be ſeized in the hands of the thief, *A.* may have a writ of reſtitution for the money ib
So if money be ſtolen, and thief taken, he ſhall have reſtitution ib
Teſtator robbed, thief convict on procurement of executor, he ſhall have reſtitution ib
If goods be ſtolen, and by thief ſold in market-overt, thief being convicted on evidence of party robbed, he ſhall have reſtitution on this *act* of thing ſold 542 to 547
By 31 *Eliz.* notwithſtanding ſale of a horſe in market-overt, owner may take him within ſix months after the felony on proof of his property, which ſhews that after ſix months he ſhall not have reſtitution 543
Scrivener's ſhop no market-overt [for plate] by cuſtom of *London* ib
By 31 Eliz. & 1 Jac. *no ſale of ſtolen goods in* London, Weſtminſter, *or* Southwark, *or within two miles to a broker ſhall change the property* ib
Shops in *London* a market-overt [with reſpect to goods uſually ſold therein] *Page* 543, 544
Whether a ſale in market-overt had barred reſtitution in appeal 544
A. commits a robbery, *king*'s officer ſeizeth goods ſtolen, and ſells them in market-overt, party robbed convicteth *A.* on his appeal, he ſhall have reſtitution if he made freſh ſuit ib
If offender be convict on evidence of party robbed, or owner, he ſhall have reſtitution, tho there were no freſh ſuit, or any inquiry by inqueſt touching the ſame; but *contra* in appeal 545
Owner prefers indictment againſt the thief, who flies, and is thereon outlawed, owner ſhall have reſtitution ib
Two perſons have their ſeveral goods ſtolen, tho thief convicted on the proſecution of one of them, the other muſt proſecute his indictment in order to have reſtitution of his goods 545. ii. 252
Antiently if *C.* was attaint on indictment preferred by *A.* and reprieved till another ſeſſions, and then *B.* preferred indictment of another robbery committed on him by *C. C.* might if he would have pleaded to the countrey, and on conviction *B.* ſhould have had reſtitution; but he might have pleaded *autrefoits attaint*, and have refuſed to have anſwered, and then *B.* ſhould have had no reſtitution; but by 21 *H.* 8. court ought to inquire by inqueſt of office touching robbery of *B.* and being aſcertained thereby to grant reſtitution 545, 546. ii. 252
Reſtitution by courſe of law, either by taking his goods, or action 546
If *A.* ſteal goods of *B.* and *B.* take his goods of *A.* again to favour him, or maintain him, how puniſhable; but if he take them again without any ſuch intent, no

no offenſe, but juſtifiable *Page* 546
But after felon convicted, it can be no colour of crime to take his goods again, where he finds them, and why ib
A. ſteals 50 *l.* in money of *B.* *A.* is convicted and hath his clergy on proſecution of *B.* *B.* brings trover for it, and held it well lies; but *contra*, if before proſecution by indictment party robbed brings *trover*, or if plaintiff in former caſe had not given evidence on conviction 546, 547
A convict within clergy on being burnt in the hand, ſhall be reſtored to poſſeſſion of his lands ii. 389
For reſtitution of blood. Vide Corruption and Reſtitution of Blood.

Return.

In temporal matters a general cauſe or return of hereſy or criminouſneſs, inſufficient; *ſignificavit* of conviction of hereſy ought to contain particular hereſy 407, 408
Inſufficient cauſe of refuſal, or *non* admiſſion of a clerk, to alledge that he is *criminoſus & non idoneus*, or that he is *ſchiſmaticus inveteratus* 407
Literal numbers allowed in returns, tho not indictments ii. 170
Vide Certiorari, Habeas Corpus, Outlawry, Proceſs.

Right. Vide Forfeiture.

Riot.

Where one may aſſemble people to defend his houſe by lawful means, which he cannot do with regard to a journey 445, 487, 547
Where by common law and ſtatutes, ſheriff, juſtices of peace, *&c.* may raiſe a power to ſuppreſs and take rioters; and where if they diſperſe not on proclamation, and any of the rioters be killed, or maimed by juſtices, or thoſe aſſembled by them to ſuppreſs the riot, it is juſtifiable *Page* 53, 293, 294, 495, 496
A preſentment of a riot by a juſtice, or two juſtices of peace, as caſe ſhall require, is a conviction by ſeveral *acts* 155
Vide Arreſt, Homicide, Juſtice of Peace, Murder and Manſlaughter, Peace-Officers, Treaſon.

River.

Thames is *alta via regia*, *king*'s high ſtream 536

Robbery.

Defined 532
What ingredients in robbery ib
Something muſt be feloniouſly taken ib
A mere aſſault to rob without taking [till late *act*] only a miſdemeanor ib
What a taking in law and fact 532, 533
If a thief compel true-man by fear to ſwear to fetch him money, which he doth, and thief receives it, robbery ib
If *A.* aſſaults *B.* and demands his purſe, and *B.* delivers it, it is a taking, and ſo if *B.* refuſe, and *A.* pray a loan or gift of money, which *B.* gives or lends, robbery 533
So if *B.* throws his purſe in a buſh, and *A.* takes it up, and carries it away, ſo if *B.* flying from thief let fall his hat, and thief takes it, and carries it away, all effect of ſame fear ib

If

If a thief without weapon drawn bid party deliver his purſe, which he doth, robbery, tho finding little in it he return it *Page* 533

A.'s purſe being faſtened to his girdle, *B.* aſſaults him to rob him, and in ſtruggling girdle breaks, and purſe falls to the ground, no robbery; but if *B.* take up the purſe, or if *B.* had purſe in his hand, and then girdle breaks, and ſtriving lets purſe fall to the ground, and never takes it up again, robbery ib

Taking in the preſence is taking from the perſon, but to conſtitute robbery it muſt be with putting in fear ib

Taking my cattle in my preſence, and putting me in fear, robbery ib

Where one, neither in view, nor aſſenting, nor preſent at robbery or aſſault may be guilty of robbery 534, 537, 538

Where words of menace are uſed after taking and not before, larciny, not robbery 534

Tho thing taken be under 12 *d.* value, felony *ſans* clergy 536

But in foreign county petit larciny, for it is not robbery there ib

A. rides out with others with deſign to rob, he parts from his company, and purſues not his deſign, they afterwards commit a robbery, *A. not guilty* 537

If a robbery be committed before ſun-riſing, or after ſun-ſet, whilſt it is ſo far day-light that the face of a man is diſcernible thereby, Hundred chargeable 557

A. intending to rob *B.* breaks a hole in his houſe, *B.* for fear throws out his money, which *A.* takes and carries away, robbery 555

One indicted for robbery *in viâ regiâ*, or *in altâ viâ*, or *altâ viâ regiâ*, and convict, is ouſted of clergy; *contra*, if *in viâ regiâ pedeſtri ducent', &c.* ii. 349

For robbing of houſes. Vide *diviſions* in titulo Burglary.

Vide Hue and Cry, Larciny.

Rogues. Vide Felony by Statute.

Sacrilege. Vide Clergy.

Sale in Market-overt. Vide Reſtitution.

Sanctuary. Vide Religion.

Scotland. Vide Realm, Treaſon.

Seal and Signet.

OF the *great ſeal*, and what things are paſſed under it *Page* 170, 171, 174, 175

Pes ſigilli, or *le targe* explained, and the uſe of it 171

The uſe of the *privy ſeal* ib

Of the *privy ſignet* ib

Seals of B. R. C. B. *and exchequer, duchy and county palatine of* Lancaſter, &c. by whom kept, in what manner, and by whom delivered 171, 172

When *king* dies, *great ſeal* continues till another made 176, 177

Proclamation *de ſigillo amiſſo*, when either *king* or ſubject loſt his ſeal caſually 183, 184

King had power to diſpoſe of lands belonging to the crown or *duchy* by letters patents under theſe reſpective ſeals [but how reſtrained at this time, *vide* 1 *Ann. Seſſ.* 1. *cap.* 7.] 278

Where counterfeiting *old great ſeal* is treaſon 177

What may be ſaid a counterfeiting the *great or privy ſeal* 181 to 186

By 1 M. *forging queen's ſign manual, privy ſignet or privy ſeal*, treaſon 178, 184

Antiently counterfeiting any of the *king*'s ſeals, treaſon 179 to 184

It

It muſt be an actual counterfeiting barely compaſſing, not treaſon *Page* 181
Affixing a true great ſeal to another patent, a great miſpriſion, but not treaſon 181 to 182
Fixing great ſeal by chancellor to a charter without warrant, no treaſon 183
Counterfeiting *king's* judicial ſeal for writs only a great miſdemeanor, ſo of the ſeal of a ſtatute merchant ib
What the judgment in counterfeiting great and privy ſeal, privy ſignet and ſign manual 187, 351, 352. ii. 398, 399

Sedition.

In ſome old books treaſon expreſt by that name, yet a charge of doing any thing ſeditiouſly amounts not to a charge of treaſon 77

Se defendendo. Vide Homicide.

Seizure.

Whether goods of an offender, and in what caſes at common law might be ſeized on the offenſe committed, or inventoried and appraiſed only; in what caſes and on what ſecurity they were to be delivered to the bailiff of party indicted, or to the conſtable or *villata* to be anſwerable for them, and in the laſt caſe, what maintenance the party and his family ſhould have had out of them 364
If no indictment, then he who ſeized, did it at his own peril, no felony being committed ib
What regulations made therein by 5 & 25 *E.* 3. 364, 365
If party comes not in, his goods forfeit on award of *exigent*, which is awarded on the ſecond *cap.* returned *non eſt inventus*, as well in treaſon as felony, tho 25 *E.* 3. mentions only felony *Page* 365
Second *cap.* iſſues with a precept to ſeiſe offenders goods, out of which ſheriff is to allow him and his family ſufficient for their ſuſtenance ib
Whether in caſe of ſuch a ſeizure a ſale for valuable conſideration before conviction and after ſeizure binds the *king*, as in caſe of ſeizure and delivery to *villata* ib
1 *R.* 3. prohibits ſeizure of goods of a party impriſoned, tho indicted, but not convicted 365
Whether this *act* extends to treaſon, tho not mentioned 366
Whether it extends to a party at large, whether indicted or not; it repeals not 25 *E.* 3. touching ſecond *cap.* with a ſeizure of goods, as to other perſons that are at large and not indicted, nor proceſs made on their indictment, if they fly not, no ſeizure can be made, whether they be indicted or not ib
If a man be at large and fly for it by this *act*, his goods cannot be ſeized and removed, whether he be indicted or not ib
If indicted and at large goods cannot be removed, but only viewed, appraiſed and inventoried where they lie ib
Tho they may not be removed, yet where party is at large, party removing not within penalty of double value ib
Nient obſtante this *act*, the uſe of ſeizing of goods of perſons accuſed of felony, tho impriſoned or not impriſoned, prevails 366, 367
A true expoſition of this *act* 367

Vide Reſtitution.

Seſſions. Vide Adjournment, Juſtice of Peace.

Sheriff.

Sheriff.

Not to take notice in *pais* of appointment of a new sheriff *Page* 499
Custody of a felon belongs to old sheriff till turned over by indenture 494, 495
Ought to deliver to commissioners of *gaol-delivery* the names of persons in prison, or let to bail to mainprize ii. 36
Sheriff fineable for wilful or negligent escape in his gaoler, but not in gaolars of gaols, in particular franchises 595, 597, 598
His power to hold pleas of the crown taken away by *Magna Charta* ii. 69
Yet afterwards had power to take indictments of felons ii. 69, 87, 106
Such power either *virtute commissionis*, which is taken away by statute, or *virtute officii* in his *Turn*, which continues ii. 69, 142
The *Turn* can take no indictment but of felony by common law, or of such matters, as are by statute limited to them, and therefore indictment of rape void there ib
It is a court of record; who the judge there, and what the style of it ii. 70
When it is to be held, if not held within the stated times, court held for that *Turn* only void ib
Indictments by one *act* must be under seal of the jury, by another *act* indented ii. 70, 152*
What freehold or copyhold indictors must have, otherwise sheriff punishable, and indictment voidable by plea ib
He can make out no process on these indictments, but must send them to justices of peace, who have power to proceed thereon ii. 70, 71, 106, 107, 142, 152*
But if original presentment not within jurisdiction of the *Turn*, justices of peace ought not to proceed thereon, tho removed before them ii. *Page* 71, 152
By common law he might issue a warrant for taking a felon before indictment ii. 106
Where bailiff of franchise cannot execute process within his franchise, but by sheriff's mandate ii. 68

Sign Manual.

By 1 Mar. *forging queen's sign manual*, treason 178, 184
Judgment in this treason 187

Si non omnes. Vide Commission.

Sodomy. Vide Buggery.

Soldier.

How soldiers were antiently retained 672, 673
Who bound to serve the *king* in his wars 675
Whether impressing them justifiable 678, 679
Etymology of *Prest* 677
Vide Felony by Statute, Constable and Marshal.

Stabbing. Vide Clergy, Indictment, Murder and Manslaughter.

Statutes in general, and their Exposition.

Tho *Westm.* 2. which gives imprisonment, where party in *assise* vouches a record and fails of it, is general, yet neither an infant, nor a *feme covert* in that case shall be imprisoned 20
General *acts*, that give corporal punishment, are not to extend to infants, therefore infant convict in ravishment of ward shall not be imprisoned, tho *act* be general; but where a fact is made felony or treason, it extends as well to infants above four-

fourteen, as to others *Page* 21, 22

5 *Eliz.* & 18 *Eliz.* which require a conviction and attainder *according to the order and courſe of law*, theſe words include indictment as well as trial, yet the words *all trials of treaſon ſhall be according to the courſe of the common law*, as in 1 & 2 *P.* & *M.* include not indictment as well as trial 221, 298, 299

1 *Mar.* reducing all treaſons to 25 *E.* 3 repeals not only treaſons enacted *de novo*, but alſo declarative *acts* 222, 260

Some things enacted to be treaſons by new and temporary laws, which were treaſon by 25 *E.* 3. 261, 262

An *act* for ſafety of *king*'s perſon, *&c.* enacts an offenſe felony, or a miſdemeanor (without a ſpecial clauſe) carries a preſumption, that ſame was not treaſon before, and is a judgment of parliament in point 262

Tho 1. *E.* 6. & 1. *M.* have taken away treaſons of 11 *R.* 2. & 1 *H.* 4. yet they are ſo far of force as to damn the falſe and extrajudicial opinions of *Treſilian*, *&c.* 266

Where an *act* makes felony treaſon by the repeal of that *act* it becomes felony again 291

When an offenſe is made treaſon or felony by *act*, and that *act* is repealed; offenſes committed before ſuch repeal, and the proceedings thereon are diſcharged by ſuch repeal, without a ſpecial clauſe in *act* of repeal 291, 309

Whether the two penalties previous to treaſon in caſe of words, *viz* for the firſt and ſecond offenſe in 5 & 6 *E.* 6 be repealed by any *act*, *quære* 296, 309, 310

The manner of proceeding (in caſes of treaſon) on a ſubſequent *act* may be directed by a precedent *act* 297. ii. 288

Where the word *king* in an *act* is perſonal, or includes his ſucceſſors *Page* 101, 310, 318, 669, 706, 707, 708

Where ſecond offenſe is ſubjected to a ſeverer puniſhment, there muſt be a conviction of the former, and judgment given thereupon 324, 685, 686, 705

Preamble of an *act* an eſtoppel, [and preſumed to be true] 327

Tho 25 *E.* 3. & 1 *R.* 3. mention only felony, yet they extend to treaſon, being *acts* for advancement of juſtice 365, 366

Acts ſpeaking of fines or ranſoms at *king*'s pleaſure mean of his juſtices 375

Where commons aſſent to an *act* is not expreſt in parliament roll 397

The words *hear and determine* in an *act* import a trial by jury 403

Interpretation of an *act* (eſpecially where a temporal intereſt is concerned) is of temporal cognizance 409

Conſtruction of many *acts* touching matters of eccleſiaſtical cognizance belongs to the temporal judge ib

Where *act* ſpeaking of *king's* ſubjects extends to aliens *here* 541, 542

Where *maintainers* denote maintainers of offenſe, not of parties 613

Procurers, *counſellors*, *abettors* import acceſſaries *before*, *receivers* or *comforters after* 614

Where an *act* makes an offenſe felony, it incidentally makes ſuch acceſſaries, as would be acceſſaries *before* or *after* at common law, but the ſpecial penning ſometimes varies the caſe 613, 614, 615, 632, 644, 704

Eyt judgment de vy & member create a felony, whereon enſue corruption of blood, eſchete to the lord, and loſs of dower 627, 641, 703

Act mentioning inferior officers extends not to ſuperior 649

Where

Where *acts* making felony extended beyond the letter *Page* 632, 654. ii. 365
Where *act* is repealed and re-enacted, or temporary, and expires, or is continued till end of next ſeſſions, and before that is continued over, where it ſhall be ſaid *contra formam ſtatuti* or *ſtatutorum*, or of which ſtatute 667, 706. ii. 173
Where one *act* relates to another, as where former makes offenſe, latter adds a penalty, how indictment to conclude ii. 173
The ſeveral ways of providing that there ſhall be no corruption of blood, &c. 703
But tho there be ſuch a clauſe, *king* ſhall have forfeiture of lands during felon's life, and his goods, for there is no eſchete to the lord, where inheritance is ſaved to the heir ib
By ſpecial clauſe forfeiture of goods, as well as lands, may be provided againſt ib
Saving corruption of blood virtually makes heir inheritable, and ſaves dower 704
Clergy not ouſted without ſpecial words ib
In all *acts* making treaſon, felony or miſpriſion of treaſon, peers to be tried by peers ib
An *act* makes offenſe felony in offenders, their counſellers, procurers and abetters, and is ſilent as to acceſſaries *after*, whether theſe implied ib
An *act* making an offenſe by name, as rape, *&c.* felony makes all preſent aiders and abetters principals, tho only one commits it; but as to clergy in ſome caſes it differs ib
If it makes the offender, his *counſellers* and *abetters* felons, yet it makes not the *counſellers* and *abetters* principals, unleſs preſent; if abſent, they are acceſſaries *before*, unleſs expreſly made all principals, whereof only one, and what inſtance ib
Act making a felony, and limiting it to be tried in a county, where party taken without negative words, but cumulative, and party may be indicted, where offenſe committed 694, 695, 705
A ſecond *act* enacting offenſe felony, that was ſo enacted before, with ſome alterations is but cumulative 705
If one *act* be grafted on another relative to it for the better execution of the former, if former be repealed, latter thereby virtually repealed ib
Act making a new felony of an offenſe that conſiſts of a fact partly in the realm, and partly out, and limiting it to be tried where offenſe committed, ſhall be conſtrued to be where that part of the offenſe is committed that is within the realm 706
Act making a new felony binds not infant under fourteen ib
How *acts* enacting capital offenſes are limited to continue 708
Act making offenſe felony includes miſpriſion, and party may be indicted of the latter only 652, 708
Where a *puiſne* affirmative *act* repeals not a former *act* 705
B. R. compriſed within *acts*, that give power to juſtices of *oyer* and *terminer* ii. 22
But juſtices of peace are not ii. 44
If a penalty be made recoverable in any of the *king's* courts of record, to what courts it extends ii. 29
Where the words *no wager of law, eſſoin, protection*, &c. *ſhall be allowed* tie up the juriſdiction to courts that can allow a protection, *&c.* ii. 30
Where the penalty is recoverable by *original writ*, &c. it is reſtrained to the ſuperior courts ib
Whether juſtices of *gaol-delivery* or *oyer* and *terminer* have a juriſdiction, where *act* limits offenſe

ſenſe to be heard before juſtices of peace ii. *Page* 36

Where *act* ſpeaks of juſtices in the county, juſtices of *gaol-delivery*, or *oyer* and *terminer* may hear and determine it ib

Acts making new treaſons to be taken ſtrictly 218

Where an *act* for trial of treaſon is to be taken ſtrictly 157

Of offenſes by ſtatutes, whereof juſtices of peace have not conuſance ii. 44

Where by a proviſion *per dominum regem & ejus concilium* is meant an antient ſtatute ii. 99

Where *mandatum domini regis* ſignifies proceſs ii. 131

If *act* be prohibitory, and by a ſubſtantive clauſe gives a recovery by action of debt, &c. but is ſilent as to indictment, party may be indicted on the prohibitory clauſe, and thereon fined, penalty not recoverable, but fine not to exceed it. ii. 173

If *act* be not prohibitory, but only *if any ſhall do ſuch a thing, he ſhall forfeit* 5l. *recoverable* as aforeſaid, offender not indictable ib

All penal *acts* inducing a forfeiture to the *king*, or making a felony or treaſon are general *acts* ii. 172

Where fatal to recite and miſrecite them or not ii. 172, 173

Acts ouſting clergy conſtrued ſtrictly ii. 335, 371

Whether the word *murder* includes *petit treaſon* ii. 340, 342

Where an *act* ouſts acceſſaries *before* of clergy, whether it neceſſarily ouſts principals not mentioned ii. 346, 347

Whether *outlawry* is included in word *attainder* 521. ii. 350, 352

All *felonies* include not *piracy* ii. 370

One of the reaſons for making 27 *H.* 8. for tranſferring uſes into poſſeſſion 247

In moſt of the particular *acts* of attainder there is a ſpecial proviſion that parties attaint ſhould forfeit all their lands, whereof they, or others were ſeiſed to their uſe, and alſo a proviſion to ſave from forfeiture ſuch lands, whereof parties were ſeiſed, to the uſe of any other *Page* 247, 248

Acts may diverſify the offenſes of acceſſary or principal according to the various penning 615

Vide Felony by Statutes, Indictment, Treaſon.

Stray.

Tho lord may ſeize it, owner may retake it within year and day 541

Suits.

Difference betwixt civil ſuits *in compenſationem damni illati*, and criminal proſecutions *in vindictam criminis commiſſi* 38

Steward.

For the court of lord high ſteward for trial of peers. Vide Court, Peer.

For court before ſteward of houſehold. Vide Court.

Subpœna. Vide Witneſs.

Superſedeas. Vide Certiorari, Commiſsion, Error, Habeas Corpus.

Supremacy. Vide King, Religion.

Surdus & Mutus. Vide Idiot.

Surety. Vide Bail.

Suſpicion.

No man bound to ſuſpect another; it is the act of his own judgment 490

Where ſuſpicion will juſtify the impriſonment of the party, or juſtify or excuſe homicide, or not, Vide Arreſt, Homicide, Murder, and Manſlaughter.

Swans. Vide Larciny.

Tail. Vide Forfeiture.

Tales. Vide Trial.

Tenure. Vide Forfeiture.

Theft-bote.

OWNER taking his goods again not to proſecute theft-bote *Page* 619
But taking them again no offenſe, unleſs to favour the thief 619
Judgment in theft-bote ii. 400

Theft. Vide Larciny.

Token. Vide Cheat.

Torn. Vide Sheriff.

Town and Townſhip. Vide Amercement.

Traverſe.

All inquiſitions taken by ſheriff by writ of *melius inquirendum*, traverſable 416
If dozeners in *Eyre*, or in *B. R.* preſent eſcape of a felon, whereby vill is to be amerced, becauſe this but an amercement, preſentment not traverſable 603
Vide Coroner, Felo de ſe, Inqueſt of Office, Preſentment.

Treaſon.

Where *king's* life is concerned, not ſafe eaſily to admit an excuſe by misfortune, tho a fact purely caſual cannot be treaſon 41
Why the offenſe and puniſhment ſo great 59
Treaſon may be committed againſt perſon of an uſurper 61
What the great brand of treaſon *Page* 75
Of treaſons at common law; great latitude in their conſtruction 79, 80, 81, 82
Accroaching royal power an antient and uſual charge of treaſon 80
Various arbitrary conſtructions of treaſons in the reign of *R.* 2. 83
The ill effect of an extrajudicial declaration of treaſon by the judges of that time 84
21 *R.* 2. & 25 *E.* 3. compared and the differences remarked 85
Juſt and expedient to lay an overt-act in indictments of treaſon ib
The unhappy conſequences of breaking the great boundary, the 25 *E.* 3. 85, 86
21 *R.* 2 repealed by 1 *H.* 4. 86
Objections againſt *conſtructive treaſons* 86, 87, 293
The petition of the commons, whereon 25 *E.* 3 was made, and the king's anſwer thereto; the *act* is made conformable to the latter 87
The ſeveral high treaſons declared by 25 *E.* 3. 91
Where a merchant ſtranger may be dealt with as an alien enemy, and where either as an alien enemy, or as a traitor 94
With what allay theſe general words of Lord Coke, *an alien enemy cannot be guilty of treaſon*, are to be taken ib
Spies ſent over by a foreign prince in hoſtility, within that rule ib
For other matters touching aliens. Vide Alien.
Treaſon in compaſſing death of king, queen, or prince, &c.
Conſort of *king or queen regent*, may be guilty of compaſſing the death of the king within this *act* 100
Who ſhall be ſaid a *king, queen, or their eldeſt ſon*, or not, within this *act* 100, 101, 123, 124
Wherein *compaſſing death of queen or prince* differs from *compaſſing mort de roy* 127

What

What ſhall be ſaid a compaſſing *king's* death *Page* 107, 108
Calculating his nativity, not a compaſſing, tho a great offenſe 108, 334, 335
Compaſſing *king's* death, tho not effected treaſon 108
What overt-act neceſſary to make ſuch compaſſing treaſon 108, 109
Conſpiring *mort de roy*, and thereupon providing weapons, or ſending letters for the execution thereof is an overt-act of compaſſing *king's* death 109
If men conſpire to impriſon the *king* by force till he hath yielded to certain demands, and for that purpoſe gather men, or write letters, it is compaſſing *king's* death ib
A conſpiring to depoſe the *king* is an overt-act of compaſſing his death 110
A foreign ambaſſador for compaſſing *king's death* ſhall be executed here for treaſon, but for other treaſons ſhall be remitted to his own country to be tried 117
Where an ambaſſador may be guilty of treaſon, vide Ambaſſador.
Compaſſing by words not an overt-act, as appears by many temporary *acts* againſt it; but words reduced to writing, *&c.* are an overt-act 111 to 120, 310, 312, 322, 323
Words may expound an overt-act indifferent in itſelf 115, 116
Whether words menacing *king's* death be an overt-act of compaſſing his death 115, 116, 117
Aſſembling together to conſult how to kill the *king* is an overt-act of compaſſing his death 119, 120, 121, 122
Whether *conſpiracy to levy war* be an overt-act, unleſs levied 119, 133, 145, 148, 322
Writing letters to a foreign prince inciting an invaſion is an overt-act 120, 122
As an overt act muſt be laid, ſo it muſt be proved 121, 149
If an overt act ſufficiently laid in the indictment be proved, any other may be given in evidence in aggravation *Page* 122
Buying a dagger for the purpoſe is an overt-act of compaſſing *king's* death ib
Aſſembling together to levy war againſt the *king*, either to depoſe or reſtrain, or enforce him to any *act*, or to come to his preſence to remove his counſellors or miniſters, or to fight againſt his lieutenant or military commiſſionate officers, *&c.* is an overt-act of ſame kind 122, 123, 138, 148, 151
A levying war by conſtruction, as to pull down all incloſures, or all bawdy-houſes, not evidence of an overt-act of compaſſing *king's* death, when it is diſcloſed upon proof, or ſo laid in indictment, but it is an evidence thereof till diſcloſed 123
Fighting *king's* forces ſent to ſuppreſs a riotous aſſembly is an overt-act of ſame nature ib

Treaſon in violating king's wife, &c.

Who ſhall be ſaid *king's* wife, his eldeſt ſon's wife, or his eldeſt daughter, to make the violation of any of them treaſon 128, 229

Treaſon in levying war againſt the king.

Levying war only treaſon within this *act* 111, 322
What muſt concur to make *levying war* treaſon within this *act* 130
What ſhall be ſaid a levying war, or not 130, 131, 149, 150, 152
A bare conſpiracy to levy war and provide weapons for that purpoſe, though in ſome caſes it may amount to an overt-act of compaſſing the *king's* death, yet it is not a levying war within this *act* 131

Aſſembling many rioters to do unlawful *acts*, if they be not *in ſpecie belli*, nor have any arms, *&c.* may make a riot, but it is not a levying war *Page* 131, 149, 150, 152

War muſt be levied againſt the king; *contra*, tho it be *more guerrino*, it is not treaſon 131, 149, 152

If on a private deſign, or private quarrel, it is no levying war againſt the king 131, 133 to 138, 140, 141, 149, 152, 260

Difference between *bellum levatum & bellum percuſſum* 152

A war levied againſt the king is of two ſorts, expreſly and conſtructively. Firſt, Againſt his forces, *&c.* Secondly, to throw down incloſures generally, to inhanſe ſervants wages, alter religion, expulſe ſtrangers, or remove counſellors, or againſt any ſtatute, *&c.* this is a levying war, becauſe end public 131, 132, 133, 134, 152, 153

Conſpiring to levy ſuch a war treaſon by ſeveral temporary *acts* 132

Clauſe in 25 *E.* 3. of conſulting the parliament in new caſes leaves no latitude to multiply conſtructive treaſons, very dangerous ſo to do ib

If a war levied, conſpirators are traitors, as well as actors 133

War levied to break priſons to deliver one, or ſome particular perſons out of lawful priſon, unleſs impriſoned for treaſon, only a great riot; but if to break priſons generally, it is treaſon 134

100 perſons *modo guerrino* aſſembled to pull down bawdy-houſes, and marched with a flag on a ſtaff and weapons, and pulled down certain houſes, held to be a levying war within this *act* by all the judges but one; objections to that judgment 134, 135

In *earl of Eſſex's* caſe reſolved, that when *queen* ſent lord keeper to him commanding him to diſmiſs the armed people in his houſe and come to her, and he refuſed to come, and continued the arms and armed perſons in his houſe, it was treaſon *Page* 138

That when he went with a troop of captains and others from his houſe into the city, and there prayed aid of the citizens in defenſe of his life, and to go with him to the court to bring him into the queen's preſence with a ſtrong hand, ſo that he might be powerful enough to remove certain of his enemies attendant on the queen, it was treaſon, the fact in London rebellion ib

That the adherence of *earl of Southampton* to *earl of Eſſex* in *London*, tho he knew not of any other purpoſe than of a private quarrel, which *Eſſex* had againſt certain ſervants of the *queen*, was treaſon in him, becauſe a rebellion in the earl of *Eſſex* ib

That all they, that went with *Eſſex* from his houſe to *London*, whether they knew of his deſign, or not, were traitors, whether they departed on the proclamation, or not; but that thoſe, that ſuddenly adhered to him in *London*, and departed on proclamation made, ought to be pardoned ib

A declaration of the king and lords [*ſans* the commons] not ſufficient within this *act* 140, 260, 263

Where 300 perſons going in a warlike manner with drums and arms to ſurpriſe a privy counſellor, held treaſon 141, 152

Breaking priſon where traitors are and cauſing them to eſcape, treaſon, tho parties knew not that they were there 141

Marching with a great army *modo guerrino arraiati*, expreſs levying war, tho no blows ſtruck 144, 145, 152

A rebellion is a levying war within this *act*, and by name of levying

vying war it muſt be expreſt in indictment *Page* 144, 145, 152
Bare detaining *king*'s forts or ſhips, or conſpiring to take them not treaſon; actual taking them, by force, a levying war within 25 *E.* 3. 146, 296, 325
Detaining *king*'s towns, *&c.* after demanded by *king*'s commiſſioner, and repelling an aſſault made by him, is a levying war within this *act* 146, 325, 326
Difference between an inſurrection on account of civil intereſt, and levying war 146
Holding one's houſe againſt the ſheriff and *poſſe comitatûs* with force, and aſſembling perſons to oppoſe the execution of a writ of poſſeſſion, no treaſon, but a great riot; the like of keeping poſſeſſion againſt a reſtitution on indictment of forcible entry ib
Aſſaulting *king*'s lieutenant in time of hoſtility or rebellion within the realm, in their march or quarters, as enemies, levying war ib
If on ſudden falling out, or injury done by the ſoldiers, the countrymen riſe and drive them out, it may be a great riot, but not levying war, except ſome traiterous deſign under cover of it ib
Open reſiſtance of juſtices of *oyer* and *terminer*, only felony ib
Touching laws of treaſon in *Ireland* by 18 *H.* 6. and *ceſſing* ſoldiers. Vide Ireland.
What uſually is the overt-act of levying war 150
Whether the bare aſſembling an enormous multitude for doing unlawful acts without any weapons, *&c.* be a ſufficient overt-act of levying war within this *act*, eſpecially if they commit ſome of theſe acts 151
Realm of *England* comprehends the narrow ſeas, invading *king*'s ſhips in the narrow ſeas, levying war *en ſon realm*; where trial to be 154
For trial of treaſons in *Scotland*, proviſion made by what ſtatutes *Page* 155
What is ſaid of *Ireland* in all particulars applicable to the *Iſles of Man, Jerſey*, &c. 155, 156, 157

Vide Ireland.

Treaſon committed in *Wales* before 26 *H.* 8. was not inquirable, or triable before juſtices of *oyer* and *terminer*, or in *B. R.* but before juſtices aſſigned by the *king* in thoſe counties of *Wales*, where fact committed 156
By 26 *H.* 8. counterfeiting, waſhing, clipping, or miniſhing coin, felonies, murders, *&c.* and acceſſaries of fame and other offenſes felonioufly done in *Wales*, or any lordſhip marcher may be inquired of and tried before the juſtices of gaol-delivery, *&c.* in next adjacent county 156, 157
26 *H.* 8. confirmed by 34 *&* 35 *H.* 8. which ſettles the grand ſeſſions, ſo that as to thoſe offenſes enumerated in 26 *H.* 8. juſtices of *gaol-delivery* in the adjacent counties, *viz. Glouceſter, &c.* had thereby a concurrent juriſdiction with juſtices of grand ſeſſions 157
Whether 26 *H.* 8. extended to treaſon for compaſſing *king*'s death, or levying war, or whether ſame remained triable by juſtices of grand ſeſſions, but now 26 *H.* 8. ſtands repealed by 1 *&* 2 *P. & M.* as to trials of treaſon ib
For what ſpecial purpoſes *certiorari* lies into *Wales*, but not as to trial of fact, but it ſhall be ſent down by *mittimus* by 7 [27] *H.* 8. 158
Wales within *England*, and therefore not within 35 *H.* 8. for trial of foreign treaſons ib
If treaſon, *&c.* be done in *Durham*, a *certiorari* lies to remove it into *B. R.* out of *Durham*,

and to whom directed; but if party plead *not guilty*, it ſhall be ſent down thither to be tried *Page* 158

Of *treaſons*, &c. in *Tindal* and *Hexamſhire* ib

Adhering to the king's enemies.

Who ſhall be ſaid an enemy; jury on trial ſhall inquire, whether the perſon to whom the party indicted adhered was an enemy, or not, and whether there was a war between *king* of *England* and that other prince, whereunto party adheres 164

Enemy extended farther than *king* or ſtate at enmity, even to an *alien* coming into *England* in hoſtility ib

Duke of *Norfolk* adhering to lord *Heriſe*, a ſubject of *king of Scots* in amity with queen *Eliz.* that made an actual invaſion upon *England* without the *king*'s commiſſion, adjudged a traitor 164

Who ſhall be ſaid to be a perſon adhering, and what an adhering 165, 166, 263

If there be war between *England* and *France*, thoſe *Engliſh* that live in *France* before the war, and continue after, they are not adherents, unleſs they aſſiſt the *French king* in his wars, or refuſe to return on privy ſeal or proclamation, and this refuſal, tho evidence of an adherence, not ſimply ſo in itſelf 165

Whether ſubjects of foreign prince continuing under *king*'s protection after war proclaimed, and aſſiſting the foreign prince before renouncing his ſubjection to the *king*, or an enemy ſtaying here under *king*'s ſafe conduct, be an adherent; in time of truce an *Engliſhman* goes into *France*, and ſtays there, and returns before truce expired, no adherence; but *contra*, if he confederate with the enemy 165, 166

Kings of *England* and *France* in amity, the *king*'s ſubjects ſolicit *king* of *France* to an invaſion, it is treaſon and an overt-act of compaſſing *king*'s death, but not of adherence *Page* 167

An *Engliſhman* during the war is taken by the *French*, and ſwears fealty to the *king* of *France*, if voluntary, it is an adherence, but if for fear of life, and he return as ſoon as he can to his allegiance, this not an adherence 167, 168

Delivering up the *king*'s caſtles or garriſons treacherouſly, or by bribery, an adherence 168, 169

If delivered on cowardice or imprudence, and not treacherouſly, tho party ſubject to death by martial law, not treaſon by common law 169

If detaining *king*'s caſtles or forts, or the caſtles of any other be barely ſuch, and without aſſault, yet if in compliance or confederacy with a foreign enemy, it is an overt-act of *adhering to king*'s *enemies*, and treaſon within this *act* 326

By 35 *H.* 8. foreign treaſons how tried; by the common law triable in any county, eſpecially where offenders lands lie 169, 170

Treaſons on the ſea triable by ſpecial commiſſion grounded on 28 *H.* 8. at common law it might be tried in any adjacent county ib

1 *Mar.* reducing all treaſons to the ſtandard of 25 *E.* 3. not only repeals treaſons newly enacted, but *acts* declarative, and all treaſons farther than the very declaration of 25 *E.* 3. extends 222, 260, 263, 265, 269, 308

Killing chancellor, treaſurer, &c. *in their place doing their office.*

This extends only to killing, not to conſpiring; but if many conſpire,

ſpire, and only one do the act, they are all traitors; 3 *H.* 7. makes the conſpiring felony *Page* 230
Expoſition on this branch of the *act* 231, 232
Juſtice of peace, as ſuch, not within it, except he be likewiſe juſtice of *oyer* and *terminer* 231
What ſhall be ſaid *ſeant en ſon place*, *ſeſant ſon office* 232
Touching principals in treaſon, *vide* Principal and Acceſſary.
In treaſon no acceſſaries, all principals; but *quære*, whether receiver of a counterfeiter of the ſeal or money be a traitor 233, 234, 237
Gaoler voluntarily permitting traitor impriſoned to eſcape, treaſon 234
Reſcue of a perſon arreſted for treaſon ſame offenſe 234, 269
Breaking priſon to inlarge a traitor, treaſon; but he muſt really be a traitor 234, 235, 326
Conſpiracy to inlarge a traitor, neither treaſon, miſpriſion, nor felony, but a miſdemeanor 326
Offenſes incident to the treaſons declared by 25 *E.* 3. are virtually included within the ſame, as receiving, *&c.* 235, 237, 238, 269
If an *act* make a new treaſon, and enact that the offender, his counſellors, abetters and aiders thereunto ſhall ſuffer as traitors, this makes not receivers or comforters after the fact traitors 235, 236, 328, 376
But whether receiving a counterfeiter of coin within 25 *E.* 3. where no ſuch reſtriction, be treaſon 328
If offenſe be made treaſon in offender, his procurers, counſellors, abettors, conſenters (without the word *thereunto*) knowing receivers not traitors, unleſs the words *receivers* or *comforters* be expreſt 236
The import of the words *procurers*, *counſellors*, *abettors*, *conſenters*, *aiders*, *receivers* and *comforters* *Page* 236
Receivers, traitors by neceſſary conſtruction of a new *act* of treaſon ib
Where an *act* general, probably receiver knowing it virtually a traitor 237
Certainly aiders, *&c.* are traitors ib
He who reſcueth one impriſoned for treaſon, or ſuffers him voluntarily to eſcape, or receiver of a traitor, ſhall not be arraigned till principal offender be convict, and why 237, 238
Receiver of a traitor how to be indicted 238
If indicted of the receipt in the ſame indictment with the principal, principal to be tried firſt; and if found guilty, then jury to inquire of the receipt; and if principal *not guilty*, then to acquit both ib
Whether proceſs of outlawry may go againſt receiver of a traitor at ſame time as againſt principal ib
What will make a man acceſſary *after* to felony will not make a man principal in treaſon 239
How far charitable relief will do it 239, 324, 325
The words in 1 *Mar.* refer to treaſons, not forfeitures; the forfeiture of traitors, as to old treaſons, ſtands in force 241, 257, 275, 283, 309
Of declaring treaſons by parliament, and thoſe that were enacted or declared between 25 *E.* 3. & 1 *M.* 258, 259, 260
Some things enacted to be treaſon by new and temporary laws, which were treaſon by 25 *E.* 3. 261, 262, 322
An *act* for ſafety of *king*'s perſon enacts an offenſe to be felony only, or a miſdemeanor, (without the clauſe, *the ſame not being treaſon within* 25 *E.* 3.) carries a preſumption with it, that ſame was not treaſon be-

fore, and is a judgment of parliament in point *Page* 261, 262
Commons impeach ſeveral of treaſon, lords only give judgment, this not *per modum legis declarativæ* 264
In the *act* of attainder againſt the *earl* of *Strafford*, proviſo, that it ſhould not be a precedent, needleſs; it did not *egredi perſonam*, and was no general declarative law to ſerve 25 *E.* 3. 269, 270
Proper proviſo in enacting new treaſons to ſave to the lords their liberties, as in caſe of felony 270
11 *H.* 7. *for ſecuring the attendants on the king in his wars*, is perpetual 272, 273
What *acts* for trials of treaſon are in force, or repealed or derogated from by any, and what other ſtatutes 282, 283, 284, 316
Trial of treaſons committed in rivers, or ports within counties, reſtored to the common law 282, 316
Expoſition of 1 *E.* 6. 3 & 4 *E.* 6. 5 & 6 *E.* 6. 287, 288
Writing of ſcandalous words (mentioned in 5 & 6 *E.* 6. and thereby made treaſon) not treaſon within 25 *E.* 3. 296
So much of 5 & 6 *E.* 6. as enacts new treaſon, repealed by 1 *Mar.* but the clauſes in that *act* touching trial of foreign treaſons, outlawry of perſons beyond the ſeas, forfeiture of lands, loſs of dower ſtand unrepealed, and ſo, *according to many*, doth the clauſe concerning two accuſers ib
In what caſes of treaſon two accuſers are required by 5 & 6 *E.* 6. whether it extends to new treaſon 297, 324
Whether 1 & 2 *P.* & *M.* took away the neceſſity of two witneſſes on the indictment 298, 299, 300
Touching the competency of ſuch witneſſes, *vide* Witneſs.
Of treaſons declared and enacted from 1 *Mar.* till 13 *Car.* 2. *Page* 307, 308
1 *Mar.* repealed all treaſons and miſpriſions of treaſons enacted ſince 25 *E.* 3. 308, 310
1 *Mar.* meddles not with thoſe new laws regulating proceedings and trials, but that done after by 1 & 2 *P.* & *M.* 309
Treaſon generally ſpoken intended of high treaſon 316
Peremptory challenge in caſe of high treaſon, reſtored; priſoner may challenge thirty-five peremptorily 317
To make a man principal in treaſon by *comfort or aid* after offenſe committed, it muſt be knowingly 323
In new treaſon *aiding and comforting* thereof, treaſon ib
If a phyſician relieve a ſick offender, tho knowing him to be a traitor, no treaſon 332
Some words or writings may be conſtrued to ſtir up inſurrection, and yet be not within 25 *E.* 3. 334
What courts have juriſdiction in treaſon 350
What the conſequents of a judgment in treaſon 354
All treaſons are miſpriſion of treaſon, and more, and he who is aſſenting to a treaſon may be indicted of miſpriſion of treaſon, if *king* pleaſes 374
Miſpriſion of treaſon may yet be tried according to 33 *H.* 8. for trials of treaſon in foreign counties ib
In miſpriſion of treaſon or felony, or acceſſary thereto, a peer tried by peers, tho indictment by common grand inqueſt ib
If a perſon arraigned of high treaſon ſtand mute, he ſhall be convicted 223, 382
Treaſon is felony, tho more, and the *king* may proceed againſt a traitor for felony only 497

25 *E.* 3. *of treaſons* called the *ſtatute of purveyance* ii. *Page* 330
Before 25 *E.* 3, what treaſons of greater note, what of leſs note ii. 331
[*Statutes relating to treaſon enacted ſince the author wrote*; in notis] 339 to 342
Whether in any caſe a non compos mentis *can commit treaſon.* Vide Idiot.
For treaſons in maintaining pope's ſupremacy, in reconciling and being reconciled to the popiſh religion, and in bringing in pope's bulls, and for treaſons committed by jeſuits, &c. Vide Religion.
For treaſon in counterfeiting the coin. Vide Coin.
In counterfeiting the great and privy ſeals, privy ſignet and ſign manual. Vide Seal and Sign manual.
For petit treaſon. Vide Petit Treaſon.
Where alien may be guilty of treaſon, or not. Vide Alien.
Vide Alligeance, Corruption and Reſtitution of Blood, Forfeiture, Indictment, Judgment, Miſprifion, Neceſſity, War.

Treaſure-trove. Vide Franchiſe, Larceny.

Treſpaſs.

Chance excuſeth from felony, but not treſpaſs 472
Treſpaſs lies for taking away dogs, bears, &c. or their whelps 512
It lies for church-wardens for taking *bona & catalla parochianorum*; ſubſtance of declaration ib
If *A.* take away the hay or corn of *B.* and mingle it with his own heap or ſtock, or take the cloth of *B.* and embroider it, *B.* may retake the whole heap or ſtock, or garment and embroidery, and be not guilty even of treſpaſs 513
Feme takes *Baron's* goods, and delivers them to *B.* who knowingly carries them away, treſpaſs *Page* 514
In treſpaſs, where it is of their own poſſeſſion, the executor, ordinary, &c. need not ſhew their title 514, 515
Vide Juſtification.

Trial.

By jury the beſt method of trial 33
Where a non compos mentis *ſhall be tried, or not, and where court in diſcretion may diſcharge the jury of him,* vide Idiot.
Where felony by ſtatute limited to a ſpecial juriſdiction, and manner of trial, miſpriſion of it triable by a common jury and general commiſſioners of *oyer* and *terminer* 653
On 8 *H.* 6. againſt *avoiding record*, trial to be one half by the clerks of the court, and the other half by others 651
Trial of *aliens* for felony to be *per medietatem linguæ* ii. 271
Whether indictment be a diſtinct thing from the trial 221, 298 to 301
Iriſh peer tried here by a common jury 155, 317, 693

Touching Jury proceſs.

If *venire fac.* or *diſtringas* be erroneous, and would make judgment ſo, if filed, but being not filed is aided by 18 *Eliz.* court never compels clerk to file ſuch writs after verdict, much leſs puniſhes them for not doing it 651
If offenſe committed in county, where *B. R.* ſits, and indictment be taken there, *B. R.* may proceed *de die in diem*, and there need not fifteen days between *teſte* and return of *venire* ii. 3, 360

And

And ſo if indictment was taken before juſtices of peace of ſame, and removed into *B. R.* by *certiorari*; but *contra*, if taken in another county than where *B. R.* ſits ii. *Page* 3, 360

Of *venire fac.* iſſuing out of *B. R.* how to bear *teſte*, &c. ii. 260

Juſtices of *oyer* and *terminer* iſſue a general precept for the return of twenty-four jurors to try the iſſue between *king* and priſoners to be arraigned ii. 26, 27, 260, 261

After the priſoners are arraigned, and have pleaded to the country, a precept iſſues in nature of a *venire fac.* when ſuch precept bears *teſte*, and when returnable in whoſe name, and under whoſe ſeals, it muſt be ii. 261

If they make it returnable any day after the firſt day of ſeſſions, they muſt make an adjournment, and record it ib

Juſtices of gaol-delivery after priſoner hath pleaded may take pannel from ſheriff without making any precept to him ib

Whether proceſs be by writ or precept, as well the award, as writ or precept muſt mention truly the *viſne*, and where it is only by award without writ or precept, as in caſe of juſtices of *gaol-delivery*, the award ought to mention the *viſne* ii. 262

If murder be ſuppoſed at *D. venire fac.* muſt be *de vicineto D.* if at *Briſtol de vicineto Briſtol*, becauſe a city; yet *de vicineto civitatis Briſtol*, tho alſo a county, good ib

If ſtroke be laid at *B.* and death at *C.* how *viſne* muſt be ib

Where ſtroke in one county, and death in another, *viſne* ſhall be from place, where party alledged to die ib

If murder be laid *in quâdam plateâ vocat.* King-ſtreet *in paroch. Sanctæ* Magaritæ *apud* Weſtm. whence *viſne to ariſe* ib

If murder be laid *apud* B. *in paroch. de* C. whence *viſne* ſhall be ii. *Page* 262

Vill or hamlet may be within a pariſh, and a pariſh may contain many vills ii. 262, 263.

Foreign pleas triable by a jury of ſame county, where party indicted, except in treaſon ii. 239 263

Tho *venire fac.* is only to return twelve, yet ſheriff ought to return twenty-four, the general precept that iſſues before a ſeſſions of *gaol-delivery*, *oyer* and *terminer*; and *peace* is to return twenty-four, but commonly forty-eight are returned ii. 263

Several indicted for one felony, juſtices may iſſue one or ſeveral *venire fac.* or awards of that kind ii. 263, 268

If it be joint, and one challenge twenty peremptorily, or for cauſe, jurors challenged ſhall be drawn againſt all, and ſo in appeal ii. 263

Expedient to make out ſeveral *venire fac.* and if pannel be challenged off, yet forty *tales* may be granted on each *venire fac.* ib

If *venire fac.* in appeal be once granted jointly, it cannot be ſevered, neither can there be ſeveral *tales*, for if *venire fac.* be joint, *tales* muſt be joint, and ſo in caſe of indictment ii. 263, 264

Before juſtices of *gaol-delivery*, where only one award, tho at firſt it be joint, and pannel accordingly returned, and the priſoners challenge peremptorily ſeverally, whereby there are not enough left on the pannel to try them, and a *tales* is awarded returnable the next day, yet court may ſever firſt award, and alſo the *tales* ii. 264

Record being made up, the award is made on the roll, which the juſtices of gaol-delivery may model,

del, as they pleaſe, at any time before trial ii. *Page* 264
On the writ or precept, or command to the ſheriff he cannot return a *mandavi ballivo*, as in ſome caſes of appeal, writ, &c. being for the *king* ib
The *analyſis* of the writ of *venire fac.* ib
They of one ſide of the county are by law *de vicineto* to try an offenſe of the other ſide of the county ib
Juſtices of *gaol-delivery* and peace have power to reform the pannel ii. 36, 156*, 265
Uſual for the judge on crown-ſide to ſend for a jury to judge at *niſi prius* ii. 265
If proceſs be in *B. R.* and jury fill not, or be challenged off, ſo that there is not a full jury, there ought to iſſue a *diſtringas juratores*, and a command to return a *tales* ii. 265, 266
But if whole jury be challenged off, then there ſhall be a new *venire fac.* and if none appear, then a *diſtringas juratores* ſhall iſſue, and no *tales* ii. 265
If a full jury appear, and before they are ſworn, one of them dies, ſo that there remains not a full jury, a *tales* ſhall be granted; and ſo if a juryman dies after returned and ſwore ii. 266
If a *tales* iſſue, and they do not appear full, or be challenged off, ſo that thoſe, that appear on principal pannel and *tales* make not up a full jury, another *tales* may be granted ib
In felony a *tales* may be granted of a greater number than the principal pannel in reſpect of the challenges, ſo that there may be forty *tales*, or more; but if ſeveral ſucceeding *tales* be granted, the latter muſt be leſs in number than that which was next before, unleſs the array of the preceding *tales* be quaſhed, and then the number of the next may equal it ii. *Page* 266
The times between *teſte* and return of *tales* muſt be as in principal *venire fac.* ib
If indictment be before juſtices of *oyer* and *terminer*, the *tales* as well as principal pannel ought to be in the name of three juſtices, and may be returnable *de die in diem*, or *de hora in horam* of ſame day ib
As to all other matters, they agree with proceedings in *B. R.* above-mentioned ib
Before juſtices of *gaol-delivery* no particular precept to return either jury or *tales*, but the general precept before the ſeſſions and the award ib
And yet there is an inſtance before juſtices of peace and *gaol-delivery* of a *tales* granted returnable the next day ii. 267
After *not guilty* received and recorded ſheriff returns pannel of jury ii. 293
Where trial of treaſon or felony ſhall be, *vide* **County, County Palatine.**
Where new trial ſhall be granted, vide *petit jury* in titulo **Jury.**
Vide **Arraignment, Certiorari, Challenge, Court, Evidence, Gaol-delivery, Indictment, Juriſdiction, Juſtices of Aſſiſe and Niſi prius, Juſtice of Peace, King's Bench, Oyer and Terminer.**

Truſt. Vide **Forfeiture.**

Turn. Vide **Sheriff.**

Venire facias. Vide **Trial.**

Venue. Vide **Trial.**

Verdict.

ON indictment of treaſon *in adhering to king's enemies*, what jury ſhall inquire of 164

In

In all cafes of infancy, infanity, *&c.* if one uncapable to commit a felony be indicted by the grand inqueſt, and thereon arraigned, petit jury may either find him *not guilty*, or find the matter ſpecially, and how, and thereon court gives judgment of acquittal *Page* 28 ii. 303

But if one in ſuch caſe be arraigned on indictment of murder or manſlaughter by coroner's inqueſt, there if party committed the fact, regularly the matter ought to be ſpecially found, becauſe if the jury find him *not guilty*, they muſt inquire how party came by his death, and how in that caſe they muſt find ib

But if he be firſt arraigned, and acquitted on the indictment by the grand inqueſt, and found *not guilty*, he may plead that acquittal on his arraignment on the coroner's inqueſt, and that will diſcharge him, and petit jury ſhall inquire farther how he came by his death 39

If priſoner indicted of murder or manſlaughter by grand inqueſt be acquitted by petit jury, they ſay ſo and no more, and only inquire of the flight; but if acquitted on pleading to coroner's inqueſt, petit jury alſo find, who killed the party, if they do not know, how in that caſe they find ii. 64, 65, 300, 301, 304, 305

If indictment be of murder or manſlaughter, and on trial it appear to jury to be involuntary, (as *per infortunium*, or *ſe defendendo*) jury ought to find the ſpecial matter, and conclude, *Et ſic per infortunium*, *&c.* and not generally, that it was *per infortunium*, *&c.* for on the ſpecial matter found court may give judgment againſt concluſion of verdict 471, 476, 477. ii. 302

If jury find him *not guilty*, they muſt inquire, whether he fled; and if they found he did fly, they muſt inquire of his goods and chattels, which is an inqueſt of office and traverſable *Page* 362, 493. ii. 301

Where one of full age ſhall be found guilty of burglary, and an infant, who was principally concerned in it, *not guilty* 556

Baron ſhall be found guilty, where *feme* in his preſence, and by his coercion commits burglary, or larciny, but ſhe ſhall be acquitted 45, 516, 556

If indictment compriſes burglary and felony, priſoner may be acquitted of burglary, and convicted of felony within clergy, or he may be acquitted of the felony; but *quære*, whether he can in that caſe be convicted of burglary 559, 560. ii. 302

Where burglary felony, and felony on 5 & 6 *E* 6. are joined in one indictment, priſoner may be acquitted of one, and convicted of the other two 560

If he be found guilty of burglary, and not of ſtealing, he may be convicted of burglary; and if acquitted of burglary, he may be convict of felony within 5 & 6 *E.* 6. and if acquitted thereof, he may be convict of larciny 561

If *A.* kills *B.* upon aſſault made on him in executing proceſs, or in his own defenſe, in the highway, or in defenſe of his houſe againſt perſons come to rob him, on *not guilty* pleaded, he ought to be acquitted ii. 158, 303

In treaſon or felony, if any *eſchete* or forfeiture of land be conceived in the caſe, petit jury ought to find true time of offenſe committed 361. ii. 179, 291

In petit treaſon priſoner may be acquitted thereof, and be convict of murder or manſlaughter ii. 184

Where there was once a writ [of exigent], and record ſince loſt, on circumſtances the jury may find

find the record, tho not ſhewn in evidence ii. *Page* 207
Where two indictments for ſame fact; one of murder, the other on 1 *Jac. of ſtabbing*; how jury to find 468. ii. 239, 240
If dureſs and compulſion will excuſe the priſoner, jury on general iſſue ought to find accordingly ii. 258, 259
If *A.* be indicted for a robbery or murder in wrong county, he ought to be acquitted, but variance between indictment and evidence in the vill immaterial ii. 291
If verdict be given by miſtake or partiality, jury may rectify it before recorded, or by advice of court go together again, and reconſider it ii. 299, 300
If recorded, they cannot retract or alter it ii. 300
In felony or treaſon no privy verdict can be given ib
If one be indicted *de morte cujuſdam ignoti*, jury ſhall be charged to tell his name, if they can ib
Where priſoner was acquitted of robbery, court antiently compelled jury to preſent who did it, but now *contra* ii. 300, 301
If coroner's inqueſt *ſuper viſum corporis* preſent a *fugam fecit*, and party be arraigned, and plead to that indictment, jury not charged to inquire of the flight, and why ii. 301
Jury may find a ſpecial verdict, or may find priſoner guilty of part, and not guilty of the reſt, or find him guilty of the fact, but vary in the manner ii. 301, 302
One indicted of robbery may be found guilty of felony, and not robbery ii. 302
So where indictment charges the larciny to be *clam & ſecretè a perſonâ* ib
One indicted on 1 *Jac. of ſtabbing contra formam ſtat.* may be acquitted on the *act*, and convicted of manſlaughter ib
One indicted of grand larciny may be convicted of petit larciny ii. *Page* 302
One indicted of murder may be convicted of manſlaughter ib
Where coroner's inqueſt found that it was *per infortunium*, and jury found him generally *not guilty*, tho fact appeared to be *infortunium*, verdict of *not guilty* recorded ii. 303
If coroner's inqueſt find not the ſpecial matter, but murder or manſlaughter, and priſoner is arraigned on it, and pleads *not guilty*, and on evidence it appears that the priſoner killed the man, but not feloniouſly, in this caſe jury cannot find a general *not guilty*, but muſt find that the priſoner did it, and the manner how, and this to be entered of record, as in caſe of a verdict *ſe defendendo* ii. 304, 305
Many ſpecial verdicts have been found, as on 1 *Jac. of ſtabbing* ſo on the point, *whether murder or not*; but it is difficult to find them ſo that judgment be given for murder, and why ii. 305
Rarely on any ſpecial verdict, where queſtion *murder or manſlaughter*, judgment given for murder, but commonly manſlaughter ib
Felony laid as required by *act* ouſting clergy, but evidence comes not up to it, where priſoner ſhall be convicted of ſimple felony ii. 336
Where verdict avoided for miſdemeanors of jury, &c. *the ſpecial matter being indorſed on the* poſtea, vide *petit jury* ſub titulo Jury.

Vide Evidence.

Verge.

For commiſſions of oyer *and* terminer *for the verge, the extent thereof, and manner of trials within the ſame*, vide Court.

Miſne. Vide **Trial.**

Miſe. Vide **Forfeiture, Statutes in general.**

Waifs.

IF a felon waive the goods ſtolen without any purſuit after him, thoſe goods are not in law *bona waviata*, nor forfeit to the *king* or lord; but if he waive them on purſuit, then they are *bona waviata*, and forfeit to the *king* or lord *Page* 541

This forfeiture is not like a ſtray, where, tho the lord may ſeize, yet owner may retake them, within year and day; but here true owner cannot ſeize his own goods, tho on freſh ſuit within year and day ib

How a man ſhall obtain reſtitution of goods waived ib

Wales.

Before 26 *H.* 8. no treaſon or felony committed in *Wales* was inquirable or triable before juſtices of *oyer* or *terminer*, or in *B. R.* in *England*, but before juſtices aſſigned by the *king* in thoſe counties of *Wales*, where fact committed 156

But by the ſame *act*, what offenſes and acceſſaries of the ſame, felonioufly done in *Wales*, or any lordſhip marcher may be inquired of, and tried before juſtices of gaol-delivery and the peace, in next adjacent county 156, 157. ii. 38

This *act* confirmed by the great ſtatute of *Wales* 34 & 35 *H.* 8. which ſettles the grand ſeſſions and juſtices thereof 157

As to offenſes mentioned in 26 *H.* 8. juſtices of gaol-delivery in the adjacent counties, and what counties theſe are, had thereby a concurrent juriſdiction with the juſtices of grand ſeſſions ib

But whether 26 *H.* 8. extended to treaſon for compaſſing *king*'s death, or levying war, or whether ſame remained only triable by juſtices of grand ſeſſions, doubtful; but now 26 *H.* 8. ſtands repealed by 1 & 2 *P.* & *M.* as to trial of treaſons *Page* 157, 282. ii. 38

In other criminal cauſes not capital, as in indictments of riots, they may be removed into *B. R.* by *certiorari*; and when iſſue is joined they may be tried in next *Engliſh* county ib

Whether a *certiorari* lies into *Wales* on indictment of treaſon or felony 158

It ſeems it may iſſue for ſpecial, and what purpoſes, but not as a trial of fact, but it ſhall be ſent down by *mittimus* according to 6 *H.* 8. ib

Wales withing realm of *England*, and therefore not within 35 *H.* 8. for trial of foreign treaſons ib

War.

Jus gladii, both civil and military, and ſo is power of making peace, *inter jura ſummi imperii*; none can levy war here without the *king*'s commiſſion 130, 159

War ſucceeds beſt when concerted with the parliament 159

What ſhall be ſaid enemies of the *king*, ſubjects not properly *hoſtes*, but rebels or traitors ib

The ſeveral kinds of peace 159, 160

A truce deſcribed 159

A league explained, and diſtributed into its ſeveral kinds 159, 160

Ubi bellum non eſt, pax eſt 160

War by the *Spaniards* on the *Indians* under pretence of religion, injurious, tho there intervened no former articles of peace between them ib

War divided into *bellum ſolemne & non ſolemne* ib

What circumſtances a ſolemn war amongſt the *Romans* had attending it 160, 161

Theſe

Theſe ſolemn denunciations of war had place only in offenſive or invaſive wars, and even then had many, and what exceptions *Page* 161
Many of theſe antient ſolemnities antiquated 162
If *de facto* there be a war between princes, they and their ſubjects are *hoſtes* to each other ib
Of the modern practice of arms 162, 163, 164
The wars we have had with foreign kings divided into ſpecial and general 162
Special uſually called *marque* or *repriſal*, ſubdivided into particular and general *marque* or repriſal 162, 163
Vide Marque or Repriſal.
General *repriſal* may grow into a formed war; an inſtance thereof between us and the *Dutch* 164
A general war of two kinds; *bellum ſolemniter denuntiatum*, or *bellum non ſolemniter denuntiatum*, both illuſtrated 163, 164
A war may be between two kingdoms without any proclamation or indiction thereof, or other matter of record to prove it 164
When the *king*'s courts are open, it is time of peace in judgment of law 347
In time of war, if one enemy plunder or rob the houſe of another, it is only an act of hoſtility 565
Offenſes of this kind, committed on ſome of ſame party, or others who are not in an hoſtile ſtate, are felonies ib
Vide Treaſon.

Warrant.

For warrants to arreſt felons, vide Arreſt, Juſtice of Peace.

For warrants to ſearch for ſtolen goods, vide Juſtice of Peace.
Vide Commitment.

Warren. Vide Park.

Were, or Weregild.

Amongſt the *Saxons* a commutation of judgment of death in caſe of homicide; but if party inſolvent, he was to ſuffer death *Page* 7, 8
How long this cuſtom prevailed, and how it came to ſurceaſe ib

Witchcraft.

Before 1 *Jac.* it was not felony, becauſe it wanted a trial [how far 1 *Jac.* derogated from by 9 *Geo.* 2. vide *act*]. 429
Vide Felony by Statute, Religion.

Witneſs.

Whether 5 & 6 *E.* 6. requiring two witneſſes on trial and indictment of treaſon extends in law to new treaſons made after the *act* 297, 324. ii. 287, 288
If a new treaſon were made by a ſubſequent *act* without any clauſe directing indictment or trial in any other manner than is appointed by this *act*, there muſt be two lawful accuſers, both on the indictment and trial ib
If there be by a ſubſequent *act* any derogatory clauſe from this *act*, then there need not be two witneſſes ib
Whether by any *act* this be repealed or derogated from with reſpect to indictment or trial 297 to 301
As to *counterfeiting coin, or ſo much as was treaſon for impairing it*, by 1 & 2 *P.* & *M.* it is expreſly provided, that no other evidence ſhall be requiſite, either on indictment, or trial, than was before 1 *E.* 6 221, 297, 298. ii. 287

As

As to clipping and washing, 5 & 18 *Eliz.* in express terms require only a conviction and attainder, *according to the order and course of the law*, and 5 & 6 *E.* 6. is so far derogated from by these *acts Page* 221, 297, 298, ii. 287

As to *all other treasons than counterfeiting, clipping, and washing coin*, 1 & 2 P. & M. hath taken away necessity of two witnesses on trial, but whether it hath taken away necessity of two witnesses on indictment 297 to 301, 324. ii. 286, 287

In misprision of treason two witnesses necessary, both on indictment and trial 300

What shall be said two lawful witnesses within 5 & 6 *E.* 6. 301, to 307

[By 7 *W.* 3. *no person shall be indicted, tried, or attainted of treason, but on the oaths of two lawful witnesses, which two witnesses must be to same treason, tho not necessary that they should both be to same overt-act*; in notis] 341

Lawfulness of witnesses respects either the persons or testimony of the witnesses 301

Where *feme* a lawful witness against *baron*, or not 302. ii. 279

She is not bound to swear against another in theft, if her husband was concerned, tho not directly against him 301

A woman taken away and forcibly married, *contra* 3 *H.* 7. may be sworn against her husband; but otherwise, if she assent to the marriage by free cohabitation 301, 302, 660, 661

Infant under fourteen not regularly admissible, but in what cases under that age he may be admitted a witness 278, 279

A party interested not a lawful witness 302, 303. ii. 280, 281, 282

A party to an usurious contract were a lawful witness, or not 302. ii. 280

One having a promise of the goods or lands of a party attainted, no lawful witness to prove the treason *Page* 303

A person outlawed in trespass a witness, tho no lawful juryman ib

A father or son, or master or servant, a lawful witness for his correlative 303. ii. 276

An adversary in a suit a good witness 303

A *particeps criminis* in some cases a lawful accuser within 5 & 6 *E.* 6. ib

An approver shall be sworn to his appeal, but whether on the trial, if appellee puts himself on his country 303. ii. 234

Two charged with a crime, one shall not be examined against the other, except he confess himself guilty ib

The party that is to be a witness against his accomplices never indicted, because he doth weaken his testimony; tho not take it away 303, 304, 305,

A party to the treason who hath confessed it, may be one of the two accusers in case of treason, and is sufficient to satisfy 5 & 6 *E.* 6 304

A promise of pardon to a party to the treason if he will discover the plot, no impediment to his testimony; but if the *king* promise a pardon on condition that if he will witness against any others, he will pardon him, and that be acknowledged, whether it will make him uncapable 304. ii. 280

Hard to take away life on the evidence of a party to the crime singly, unless there be strong circumstances 305

A remainder man expectant on an estate-tail, not a good witness; but a disseisor may be a witness to a deed made to the tenant 306

One convict of conspiracy, perjury, or forgery, not a lawful witness; *contra*, if he be pardoned ib

Treſpaſs againſt *A. B.* and *C.* if no evidence be given againſt one to prove him guilty, he may be examined on the part of the other defendants; and if two be indicted, and there be no evidence againſt one, whether he may not be a witneſs for the other; but otherwiſe it is, if there be a colourable evidence againſt him *Page* 306, 307
Wife may be an evidence againſt her huſband indicted for aiding another to commit a rape on her 629
Where an infant under twelve in capital caſes may be heard without oath 634, 635. ii. 284
Difference between admitting a witneſs to be heard, and believing him when heard 635
Second wife married, leaving the former, may be a witneſs againſt the huſband, but not the firſt wife 693
Jurors triers of credibility of witneſſes, as well as truth of the fact 635. ii. 235, 276, 277
Many things diſable a juror, which diſable not witneſſes ii. 276
Diſtinction between exception to the credit, and to the competency ii. 276, 277
One outlawed a competent witneſs ii. 277
Who witneſſes or not, and how incompetent witneſſes reſtored ii. 277 to 285
He that alledgeth an exception of record, ought to ſhew forth a copy of the record atteſted, or vouch the roll in court ii. 278
If *king* pardon incompetent witneſſes, they are rendered competent, tho their credit ſhall be left to the jury ib
Whether an infidel be a competent witneſs; a *Jew* may be ſuch ii. 279
A reward given to one for giving his teſtimony, diſables him ii. 280
Conſequential benefit to the witneſs diſables not his teſtimony, tho it may abate his credit ii. *Page* 280, 281
Three actions ſeverally brought againſt three perſons for perjury, on the ſame point, on trial of the firſt action, the other two are competent witneſſes being not immediately concerned, tho conſequently the point being the ſame ii. 280
So where indicted of perjury on three ſeveral indictments touching ſame matter, while the other two ſtands unconvicted, they may be examined 303
Where one not a witneſs, becauſe his own ſuit ii. 281, 285
Appellant nonſuit on appeal may be a witneſs for the *king* ii. 282
Where *king*'s teſtimony allowed or not ib
Witneſſes are brought in by *ſub-pœna* iſſued by juſtices of peace, *oyer* and *terminer*, *gaol-delivery*, or *B. R.* where the plea triable ib
Or the juſtices that take examination of the accuſed, and information of witneſſes, or the coroner that doth the ſame, may at that time, or any other time after, and before trial, bind over the witneſſes to appear at the ſeſſions, and in caſe of refuſal either to come, or be bound over, may commit them for contempt ii. 52, 282
Juſtices, *&c* have no power to allow witneſſes their charges ii. 282
Formerly evidence given for priſoner in caſes capital examined without oath; but *contra* in caſes not capital ii. 283
If a witneſs be ſworn for the *king*, yet if that witneſs alledge any matter in his evidence that is for the priſoner's advantage, that ſtands for a teſtimony for the priſoner as well as the *king* ib
One of nine years hath been ſworn on evidence, in capital cauſes ii. 283, 284

Where they that live, and have land in the hundred, are competent witneſſes, or not, in an action againſt the hundred on the ſtatute of *Winton* ii. *Page* 280, 281

Vide Evidence.

Wool. Vide Felony by Statute.

Words.

Words are eaſily ſubject to be miſtaken or miſapplied, or miſrepeated, or miſunderſtood, by the hearer 111, 112

1 *E.* 6. puts the very ſame offenſes in words ſpoken in a lower rank of puniſhment than the ſame things written or printed *Page* 291, 296, 315

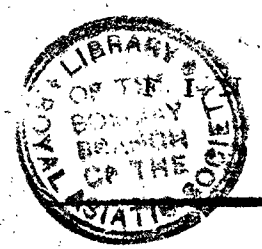
Writing ſcandalous words mentioned in 5 & 6 *E.* 6. and thereby made treaſon, not treaſon within 25 *E.* 3 296

Whether the two penalties previous to treaſon in caſe of words, *viz.* for the firſt and ſecond offenſe in 5 & 6 *E.* 6. be repealed by any *act* ib

Words no provocations to kill a man, nor will they leſſen a crime from murder to manſlaughter, except words of menace of bodily harm 456, 457

Vide Murder, Treaſon.

Year and Day. Vide Computation.



I S.

CORRIGENDA in the TABLE.

In titulo Allegiance for *fidelitas regia*, read *fidelitas legea*. From Ambaſſador refer to Treaſon. From Amendment to Record. In the references under Appeal, inſtead of Vide Proceſs, make it Vide Outlawry. *In titulo* Arreſt, after theſe words, *For what end conſtable or any other during affray may break open doors*, inſert *but not after—— unleſs*, &c. Under Burglary dele *clergy allowed to one attaint*, which is inſerted under its proper head Clergy. For the form and *analyſis* of caption of indictment on return of *certiorari*, refer from Certiorari to Indictment. From Certiorari refer to Plea. Refer from Coverture to Principal and Acceſſary. Under Jeſuit *dele* reference to Treaſon.

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